

NORTH CAROLINA COURT OF APPEALS REPORTS

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

IN THE MATTER OF: RYAN MILLS; ASHLEY MILLS; SAMANTHA GRIGG,
MINOR CHILDREN

No. COA01-767

(Filed 6 August 2002)

**1. Termination of Parental Rights— neglect—clear, cogent,
and convincing evidence**

Although the trial court erred by finding and concluding in a termination of parental rights case that respondent putative father neglected the three pertinent children based on the fact that he never appeared in court in the underlying juvenile file concerning his children, the trial court did not err by concluding that clear, cogent, and convincing evidence existed to show that respondent father neglected the three children after respondent learned of their existence, because: (1) respondent displayed minimal interest in the children's welfare, and respondent indicated that he would relinquish his rights to the children if the tests showed that one of the children was not his daughter; (2) respondent never requested visitation rights with the children, nor has respondent ever filed a motion seeking visitation rights with the children despite being represented by counsel; and (3) respondent has never paid any child support for any of the children, and he did not send the children any gifts or other type of acknowledgment on their birthdays.

IN RE MILLS

[152 N.C. App. 1 (2002)]

2. Termination of Parental Rights— stable home environment—best interests of child

The trial court did not err by concluding in a termination of parental rights case that it was in the children's best interests that respondent putative father's parental rights be terminated, because: (1) all three children are thriving in stable foster care where their particular medical and behavioral conditions are being properly addressed; (2) respondent has no biological connection to any of the children, and suffers from a significant medical condition; and (3) it was within the trial court's discretion to determine that the children's interests would be better served by remaining in a familiar and stable home environment rather than moving to an alien state to live with strangers only distantly related to them.

Judge TYSON concurring in part and dissenting in part.

Appeal by respondent from judgments entered 2 May 2001 by Judge Gary S. Cash in Buncombe County District Court. Heard in the Court of Appeals 13 February 2002.

J. Elizabeth Spradlin for respondent appellant.

Buncombe County Department of Social Services, by John C. Adams, for petitioner appellee.

TIMMONS-GOODSON, Judge.

Richard N. Mills ("respondent") appeals from judgments terminating his parental rights to minor children Ashley Nicole Mills ("Ashley"), Samantha McNeill Grigg ("Samantha"), and Ryan Alexander Mills ("Ryan") (collectively, "the minor children"). For the reasons stated herein, we affirm in part and reverse in part the judgments of the trial court.

The facts pertinent to the instant appeal are as follows: Respondent and Charlene Diane Mills King ("Charlene") married in 1986 and resided in North Carolina. One son, Casey Mills ("Casey"), was born of the marriage on 27 May 1987. Respondent and Charlene separated in 1988, and respondent moved from North Carolina to Seattle, Washington, with Casey and remained in contact with Charlene for approximately six months. Respondent thereafter had no further contact with Charlene. Respondent moved to Spokane, Washington, and then to Lynchburg, Ohio, where he currently resides

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with his son, Casey, his fiancée, Micaela Montgomery, and her three children. Charlene divorced respondent in 1996.

While respondent and Charlene remained married but separated, Ashley was born 8 August 1989, Samantha was born 27 July 1992, and Ryan was born 16 March 1995. Respondent was unaware, however, of the children's existence. On 20 October 1998, the Buncombe County Department of Social Services ("DSS") filed juvenile summons and petitions, alleging that the minor children were neglected children. On 1 February 1999, the court adjudicated all three children to be neglected children on the grounds that their mother had abandoned them, failed to provide appropriate care and supervision, and deprived Ashley of necessary medical care, such that the children lived in an environment injurious to their welfare.

Respondent had no knowledge of the minor children or the adjudication until he was sued and served for Ashley's child support on 26 October 1999. When respondent contacted DSS about Ashley, he learned of the existence of the other minor children, all of whom were in the custody of DSS. At that time, respondent believed that Ashley might be his child, but a paternity test statistically excluded respondent as the biological father of Ashley on 14 April 2000. The child support action was properly dismissed against respondent.

On 10 April 2000, DSS filed a petition to terminate the parental rights of the mother, Charlene, respondent, and the known and unknown biological fathers. The matter came before the trial court on 4 September and 3 October 2000. Respondent appeared and was represented by counsel at the termination hearing. Based on the evidence presented at the hearing, the trial court made the following pertinent findings of fact concerning respondent's rights as to Ashley:

14. That Todd Hayes [social worker for the Buncombe County Department of Social Services] also testified as to the allegations of the petition pertaining to the Respondent Legal Father; that said Respondent has no relationship to the minor child and has admitted that he is not the biological father of said child; that Hayes first talked with said Respondent at some time in October of 1999; that paternity testing of said Respondent occurred in January or February of the year 2000 and of the minor child in March of said year; that said Respondent told Hayes that when they first talked that he wanted to wait to visit with the minor child until it was determined whether or not he was her biologi-

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cal father; that said Respondent last spoke with Hayes at some time in March of 2000 and continued to state that until paternity testing was completed he did not want to commit to any relationship regarding the minor child; that a home study has never been completed on the home of said Respondent; that on or about May 4, 2000, Hayes learned that said Respondent was excluded as the biological father of the minor child, Ashley, when he spoke with the guardian ad litem of said child; that said Respondent did not request visitation with said child prior to the filing of this petition.

15. That the last contact Todd Hayes had with the Respondent Legal Father was on March 22, 2000 through a telephone conversation, and prior to that, Hayes had only three brief telephone conversations with said Respondent; that said Respondent had originally stated to Hayes that he would relinquish his parental rights to the minor child; that the said Respondent has never provided any love, nurturance, or support for the minor child and has filed no motion with the court requesting visitation with said child.

16. That the Respondent Legal Father testified in this matter; that he resides in Ohio with his son, Casey, his fiancée, Micaela Montgomery, and her children; that he first became aware of the existence of the minor child on October 26, 1999 when he was served with child support papers; that he began to seek information about the minor child that day, specifically, by contacting Mr. Rhodes of the Child Support Enforcement Agency; that on October 27, 1999 the Respondent Legal Father contacted the Ohio Legal Aid in order to obtain a lawyer to represent him in the child support action, and he was appointed an attorney.

17. That the Respondent Legal Father testified in that action that he appeared in Court in Ohio two or three times and was represented by an attorney; that at his last court appearance in said case in early March of 2000, the child support case was dismissed due to it being determined that he was not the biological father of the minor child; that said Respondent testified that he requested a continuance of said case in order [to see for] himself . . . what the DNA testing showed.

. . . .

19. That the Respondent Legal Father admitted that he has never seen the minor child and has never provided any love, nurtu-

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rance, or support for the minor child.

20. That the Respondent Legal Father is not employed and receives \$700.00 a month on SSI-SSDI. The Respondent Legal Father was diagnosed approximately twelve to thirteen years ago with Schizophrenia and took medications for the illness. The Respondent Legal Father took himself off his medication more quickly than his doctor advised. The Respondent Legal Father sees a psychiatrist once every six months. The Respondent Legal Father admitted to difficulties with nerves and some paranoia when around crowds of people and that he was hospitalized in the 1980's for six months under a voluntary placement. After his release from the hospital he spent some time in a half[-]way house.

21. That the Respondent Legal Father is unaware of the special needs of the minor child, but indicated that he would provide care for her. The Respondent Father wants placement of the child because Casey is the child's half[-]sibling.

....

23. That Micaela Montgomery, fiancée of the Respondent Legal Father, and Brigid Montgomery, her daughter, testified that the Respondent Father is a good father.

....

25. That the Respondent Legal Father is the legal parent only and has no biological relationship to the minor child. The child was conceived after the Respondent Mother and respondent Legal Father had separated. The Court cannot find that the Respondent Legal Father willfully left the minor child in foster care for twelve months pursuant to N.C.G.S. 7B-1111(2) in that he was not aware of the child's existence until October 1999.

26. That the Respondent Legal Father filed an answer to the termination of parental rights petition herein on May 20, 2000; he had made no appearances in court regarding the minor child in her underlying juvenile action; that he has no relationship whatsoever with any of the children who are the subject matter of this termination of parental rights proceeding; that after learning that he might be the father of the child in October of 1999, he only stated to the social worker for the Buncombe County Department of Social Services that he desired visitation if it were shown that

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he was the biological father of Ashley; that after learning that he was shown by paternity testing not to be the biological father of the minor child at some time in the spring of 2000, he made no requests of the Department or any other individual for visitation, contact or any other involvement with Ashley; that he was served with this petition to terminate his parental rights by certified mail on April 17, 2000.

The court made identical findings as to the other two children. Based on the above-stated findings, the trial court concluded that respondent had neglected the minor children, and that it was in the best interests of the children for respondent's parental rights to be terminated. The trial court therefore terminated respondent's parental rights to all three minor children on 2 May 2001 in three separate judgments. Respondent appeals from these judgments, which we now review.

[1] Respondent argues that there was no clear, cogent and convincing evidence that he neglected the children, and that the trial court therefore erred in otherwise finding. For the reasons stated herein, we affirm in part and reverse in part the judgments of the trial court.

Under the North Carolina General Statutes, a termination of parental rights proceeds in two stages: (1) the adjudicatory stage, governed by section 7B-1109, and (2) the dispositional stage, governed by section 7B-1110. *See* N.C. Gen. Stat. § § 7B-1109, 7B-1110 (2001); *In re Carr*, 116 N.C. App. 403, 406-07, 448 S.E.2d 299, 301 (1994). During the adjudicatory phase, the petitioner must show by "clear, cogent and convincing evidence" the existence of one or more of the statutory grounds for termination of parental rights set forth in section 7B-1111. N.C. Gen. Stat. § 7B-1109(f) (2001). This Court reviews the adjudicatory phase to determine whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence, and, if so, whether these findings in turn support the trial court's conclusions of law. *See In re Ballard*, 63 N.C. App. 580, 586, 306 S.E.2d 150, 154 (1983), *reversed on other grounds*, 311 N.C. 708, 319 S.E.2d 227 (1984). Findings for which there exists competent evidence are binding on appeal, even where there is evidence to the contrary. *See In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988). "If a conclusion that grounds exist under any section of the statute is supported by findings of fact based on clear, cogent, and convincing evidence, the order terminating parental rights must be affirmed." *Ballard*, 63 N.C. App. at 586, 306 S.E.2d at 154.

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Once the trial court concludes that one or more of the statutory grounds exist, it proceeds to the dispositional phase to determine whether parental rights should be terminated. *See* N.C. Gen. Stat. § 7B-1110(a); *Carr*, 116 N.C. App. at 406-07, 448 S.E.2d at 301. During this phase, the trial court exercises its discretion in determining whether termination of the parental rights is in the child's best interest. *See Carr*, 116 N.C. App. at 407, 448 S.E.2d at 301.

In the instant case, the trial court found and concluded that respondent neglected all three children as set forth in section 7B-1111(a)(1) of the General Statutes. Under this section, a "juvenile shall be deemed to be . . . neglected if the court finds the juvenile to be . . . a neglected juvenile within the meaning of G.S. 7B-101." N.C. Gen. Stat. § 7B-1111(a)(1). A neglected juvenile is one

who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2001). "An individual's 'lack of parental concern for his child' is simply an alternate way of stating that the individual has failed to exercise proper care, supervision, and discipline as to that child." *Williamson*, 91 N.C. App. at 675, 373 S.E.2d at 320. Further, in determining whether neglect has occurred, "the trial judge may consider . . . a parent's complete failure to provide the personal contact, love, and affection that inheres in the parental relationship." *In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982).

Respondent asserts that no clear, cogent, and convincing evidence exists to support the trial court's finding that he neglected the children. We disagree. The evidence presented at trial clearly indicated that respondent, after learning of the children's existence, displayed merely minimal interest in their welfare. At trial, Todd Mitchell Hayes ("Hayes"), a social worker with DSS, testified that when he spoke with respondent in January of 2000, respondent expressed some interest in visitation rights, but only if the paternity test showed that he was Ashley's biological father. Respondent also indicated at that time that he would relinquish his rights as to the children if the tests showed that Ashley was not his daughter. When Hayes spoke to respondent on 22 March 2000 in order to pursue the relinquishment of

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his parental rights, moreover, respondent informed him that, “he was wanting to wait until everything was resolved.” Respondent spoke with Hayes, the caseworker assigned to the children’s case, on the telephone briefly only three or four times. Hayes confirmed that respondent never requested visitation rights, nor has respondent ever filed a motion seeking visitation rights with the children, despite being represented by counsel. Respondent has never paid any child support for any of the children, and he did not send the children any gifts or other type of acknowledgment on their birthdays.

We conclude that the above-stated evidence amply supports the trial court’s findings and conclusion that respondent neglected the children after learning of their existence. We agree with respondent, however, that the trial court erred in finding and concluding that respondent “never appeared in court in the underlying juvenile file concerning his child.” The record does not indicate that respondent was served with notice of the adjudication of neglect, and it appears that respondent was not aware of the children’s existence until after the adjudication hearing. Thus, it was error by the trial court to conclude that respondent neglected the children on the basis of his failure to appear at the adjudication hearing. We therefore reverse in part the judgments of the trial court and remand the case for the singular purpose of striking the erroneous finding that respondent “made no appearances in court regarding the minor child in her underlying juvenile action” and the conclusion that respondent neglected the children because he “never appeared in court in the underlying juvenile file.” In light of the other, above-summarized evidence, however, the erroneous finding was not necessary to the trial court’s conclusion that respondent neglected the children. We therefore hold that there was clear, convincing and cogent evidence to support the trial court’s remaining findings of fact, and that these findings, in turn, support the court’s conclusion that respondent neglected the children.

[2] We further conclude that the trial court properly determined that it was in the children’s best interests that respondent’s parental rights be terminated. The evidence showed that all three children are thriving in stable foster care, where their particular medical and behavioral conditions are being properly addressed. Respondent has no biological connection to any of the children, and suffers from a significant mental condition. It was well within the trial court’s discretion to determine that the children’s interests would be better served by remaining in a familiar and stable home environment rather than

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moving to an alien state to live with strangers only distantly related to them. We therefore hold that the trial court did not abuse its discretion in terminating respondent's parental rights during the dispositional phase of the hearing.

In conclusion, we reverse in part and affirm in part the judgments of the trial court terminating respondent's parental rights to Ryan Mills, Ashley Mills, and Samantha Grigg. We remand the judgments to the trial court and hereby direct the court to strike those portions of the judgments finding and concluding that respondent neglected the children by failing to appear at the underlying juvenile actions. We otherwise affirm the judgments of the trial court.

Affirmed in part, reversed in part, and remanded.

Judge WYNN concurs.

Judge TYSON concurs in part and dissents in part.

TYSON, Judge, concurring in part and dissenting in part.

I concur with the majority's opinion that the trial court erred by concluding that Richard N. Mills ("respondent") neglected Ashley Nicole Mills, Samantha McNeill Grigg, and Ryan Alexander Mills (collectively "minor children") based on his failure to appear at the underlying juvenile action adjudicating the minor children neglected. I respectfully dissent from the majority's holding that clear, cogent and convincing evidence exists to support the trial court's remaining findings of fact. I would reverse the judgments of the trial court.

I. Termination of Parental Rights

Trial courts conduct termination of parental rights proceedings in two phases: (1) the adjudication phase governed by N.C.G.S. § 7B-1109 and (2) the disposition phase governed by N.C.G.S. § 7B-1110. *In re Mitchell*, 148 N.C. App. 483, 488, 559 S.E.2d 237, 241 (2002) (citations omitted). The petitioner, DSS, carries the burden of proof to show that one or more of the statutory grounds set forth in G.S. § 7B-1111 exists by clear, cogent, and convincing evidence during the adjudicatory phase. *Id.* (citing N.C. Gen. Stat. § 7B-1109(e)-(f) (1999)). We review the adjudicatory phase to determine whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence, and, if so, whether these findings support the trial court's conclusions of law. *In re Ballard*, 63 N.C. App. 580, 306

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S.E.2d 150 (1983); *modified on other grounds*, 311 N.C. 708, 319 S.E.2d 227 (1984).

Only after the trial court finds that one or more of the statutory grounds exists may the trial court proceed to the disposition phase to determine whether termination of the parent's rights are in the best interest of the child. N.C. Gen. Stat. § 7B-1110(a) (2001); *Mitchell*, 148 N.C. App. at 488, 559 S.E.2d at 241; *In re Carr*, 116 N.C. App. 403, 448 S.E.2d 299 (1994). At the disposition phase, the trial court must exercise its discretion to determine whether termination of parental rights is in the child's best interest. *Id.*; *see also In re Tyson*, 76 N.C. App. 411, 419, 333 S.E.2d 554, 559 (1985).

II. Respondent's Alleged Neglect

The trial court found that respondent neglected all three children as provided in N.C. Gen. Stat. § 7B-1111(1) (2001). Neglect was the only statutory ground the trial court found to terminate respondent's parental rights.

The trial court, using identical language in three separate judgments, concluded that:

the Respondent Legal Father neglected the minor child pursuant to N.C.G.S. § 7B-1111(1) after he learned of the existence of the minor child in that he never visited with the minor child, he never appeared in court in the underlying juvenile file concerning the child, he has only had contact with the social worker concerning his child three times since October 1999 and the last contact on March 22, 2000, and it is reasonable to assume that she [sic] would continue to neglect the minor child if the child were returned to her [sic] care and supervision.

The majority's opinion lists findings of fact found by the trial court. The majority's opinion concludes that "[t]he evidence presented at trial clearly indicated that respondent, after learning of the children's existence, displayed merely minimal interest in their welfare." The majority's conclusion is based entirely on the testimony of Todd Mitchell Hayes ("Hayes"), a social worker with the Department of Social Services ("DSS"). The trial court made no findings on credibility of the witness or the probative value of the evidence. Respondent rebutted every critical point made by Hayes, offered an alternative explanation, and submitted additional evidence. The majority opinion does not mention any of respondent's testimony or other evidence.

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The trial court's findings of fact, and the majority's reliance thereon, to support the conclusion that respondent neglected the minor children can be summarized as follows: (1) respondent is the legal parent only and has no biological relationship to the children, (2) the children were conceived after respondent and Charlene separated, (3) respondent has no relationship with the minor children, (4) six months after respondent separated from Charlene he ceased further contact with her, (5) respondent has never seen the minor children, (6) respondent indicated in a telephone call that he might relinquish his legal rights to the children, (7) respondent never provided any love, nurturance, or support for the minor children, (8) respondent never requested to visit with the children even after finding out that he was the legal father of the minor children, (9) respondent did not file a motion with the court requesting visitation with the children, (10) respondent did nothing other than appear in Court in Ohio concerning Ashley's child support action after DNA testing statistically excluded him from paternity, (11) respondent told a social worker on the telephone that he "desired visitation if it were shown that he was the biological father of Ashley," (12) respondent made no requests for visitation after paternity tests statistically excluded him as the biological father of Ashley, (13) respondent is not employed and receives \$700.00 per month SSI, (14) respondent was diagnosed twelve to fifteen years ago with Schizophrenia, (15) respondent visits a psychiatrist every six months, (16) respondent has difficulty with nerves, and (17) respondent is unaware of the special needs of the children.

III. Respondent's Evidence

None of the findings of fact offered in support of the conclusion that defendant neglected his children are supported by clear, cogent, and convincing evidence. The first four findings of fact listed above are irrelevant given respondent's presumption of paternity that was unchallenged and not rebutted. The last four are absolutely irrelevant to whether defendant neglected his children, and are more directed toward a "best interest" analysis, which is not reached unless grounds to terminate respondent's parental rights are found to exist by clear, cogent, and convincing evidence. Rights of parents cannot be abrogated or balanced until a parent is found to have acted in a manner inconsistent with his or her constitutionally protected status. *See Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001).

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A. Respondent's Presumption of Paternity

"North Carolina courts have long recognized that children born during a marriage, as here, are presumed to be the product of the marriage." *Jones v. Patience*, 121 N.C. App. 434, 439, 466 S.E.2d 720, 723 (1996) (citing *Eubanks v. Eubanks*, 273 N.C. 189, 197, 159 S.E.2d 562, 568 (1968); 3 Robert E. Lee, *North Carolina Family Law*, § 250 (4th ed. 1981) (citing cases dating back to 1862)). " '[T]he presumption is universally recognized and considered one of the strongest known to the law.' " *Id.* (quoting *In re Legitimation of Locklear*, 314 N.C. 412, 419, 334 S.E.2d 46, 51 (1985); citing 3 Lee, *North Carolina Family Law*, § 250); see also 3 Lee, *Family Law*, § 16.11 at 16-28 (5th ed. 2000). Among the reasons for this long-standing and consistent rule is "[t]he marital presumption reflects the force of public policy which seeks to prevent 'parent[s] from bastardizing [their] own issue.' " *Id.* (quoting *State v. Rogers*, 260 N.C. 406, 408, 133 S.E.2d 1, 2 (1963)).

During all proceedings before the trial court, DSS considered respondent as the legal father. The trial court found that respondent was, in fact, the legal father of the minor children. Respondent's standing as the legal father of the three minor children is uncontested.

B. Respondent's Efforts

As to findings of fact five through twelve, respondent was sued for child support on 26 October 1999. Respondent testified during the termination hearing that he immediately called DSS upon learning that he was identified as Ashley's father. Respondent testified that during that phone call he learned for the first time that two other children, Ryan and Samantha, existed. Respondent testified that he experienced difficulty obtaining any information from DSS, and that he received mixed messages from DSS after he inquired about obtaining custody of all the minor children.

Respondent testified that it would be best for all the minor children to live in his home with Casey, their brother, rather than to subsist in different foster homes, separated from each other and living with strangers. Casey is the closest familial link to all the children because they share a common mother. All children except Samantha bear respondent's last name. Respondent testified that DSS informed him that it was in the "children's best interest" for none of them to have any contact with respondent. Respondent also testified that DSS

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informed him that North Carolina courts would not allow him to obtain custody of all three minor children.

As to finding of fact five, seven, eight, ten, eleven, and twelve, respondent testified that DSS prevented or thwarted his numerous efforts to visit his minor children. He testified that DSS repeatedly told him that he would have to wait until a hearing to do anything. Respondent also testified that even after the DNA excluded him as the biological father of Ashley, he continued to seek custody of the three minor children. At trial respondent was asked during cross-examination: "It's also true is it not, that you had no phone contact with these children since [learning of their existence]." Respondent answered: "I wasn't allowed, nobody would give me the numbers or addresses to even—I asked to write them a letter to let them know about me and Casey, to send pictures, to do whatever I could do, and I was always denied." This testimony was not refuted.

As to finding of fact seven, respondent testified that once he learned of the existence of the three minor children, he offered to financially support all of them. DSS failed to co-operate. Respondent's telephone bill, introduced into evidence, indicated over twenty phone calls placed from his home in Ohio from 21 January to 5 May 2000 concerning his minor children in North Carolina.

IV. Clear, Cogent and Convincing Evidence

"A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one." *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 27, 68 L. Ed. 2d 640, 650 (1981); *See also In re Clark*, 303 N.C. 592, 600, 281 S.E.2d 47, 53 (1981). "The burden of DSS on the merits of the petition is a heavy one." *Clark*, 303 N.C. at 604, 281 S.E.2d at 55.

"The burden on DSS to prove facts which would support termination is by 'clear, cogent and convincing evidence.'" *Matter of Bradley*, 57 N.C. App. 475, 480, 291 S.E.2d 800, 803 (1982) (citation omitted). "Clear, cogent and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt." *North Carolina State Bar v. Sheffield*, 73 N.C. App. 349, 354, 326 S.E.2d 320, 323 (1985) (citing *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984)). "It has been defined as 'evidence which should fully convince.'" *Id.* (quoting *Williams v. Blue Ridge Bldg. & Loan Ass'n*, 207 N.C. 362, 177 S.E. 176 (1934)).

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North Carolina courts require the State to present strong evidence to support termination of parental rights. *See e.g. In re Moore*, 306 N.C. 394, 405, 293 S.E.2d 127, 133 (1982) (held that three grounds for termination were supported by clear, cogent, and convincing evidence, and as to one of these grounds “there was no evidence to the contrary”); *In re Nesbitt*, 147 N.C. App. 349, 355-56, 555 S.E.2d 659, 664 (2001); (held that the evidence was “neither plenary, nor overwhelming, nor uncontradicted” to support termination of parental rights); *Alleghany County Dept. of Social Services v. Reber*, 75 N.C. App. 467, 331 S.E.2d 256, 258 (1985) (court held case law requires stronger evidence to terminate parental rights); *In re Adcock*, 69 N.C. App. 222, 227, 316 S.E.2d 347, 350 (1984) (court found the totality of evidence to support termination “was plenary, clear, cogent and convincing”); *In re Biggers*, 50 N.C. App. 332, 343, 274 S.E.2d 236, 243 (1981) (court found “overwhelming and uncontradicted evidence” to support termination).

Here, the additional evidence provided by respondent is uncontradicted and fully explanatory. Respondent’s credibility was not impeached, nor did the trial court find him unbelievable. The trial court was not free to disregard or ignore contradictory, explanatory, or other competent evidence offered by respondent. When respondent’s evidence is considered alongside the testimony of Hayes, there is no evidence which is “overwhelming,” “uncontradicted,” “plenary,” or “fully convincing” to support the trial court’s findings of fact. The majority’s holding eviscerates the clear, cogent, and convincing standard in this case. The majority’s opinion would reduce the clear, cogent and convincing requirement to nothing more than a preponderance of the evidence standard. Such a holding places DSS on equal footing with a parent’s constitutionally protected status, which is contrary to well-established precedent and is impermissible.

V. Conclusion

I concur with that portion of the majority’s opinion which reverses and remands the trial court’s judgments. DSS failed to prove that respondent’s conduct is inconsistent with his protected status as a legal parent of the minor children. No findings of fact are supported by clear, cogent, and convincing evidence to uphold the trial court’s conclusion that respondent neglected the minor children. Respondent’s testimony and other evidence presented, the great majority of which is uncontradicted and undisputed, shows substantial evidence contrary to the trial court’s findings of fact.

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After review of the entire record, I would hold that the trial court's findings of fact are not supported by clear, cogent, and convincing evidence. I would reverse the remaining parts of the trial court's judgments terminating respondent's parental rights.

LINDA GUTHRIE, PLAINTIFF v. RAYMOND CONROY AND CLEGG'S TERMITE AND
PEST CONTROL, INC., DEFENDANTS

No. COA01-740

(Filed 6 August 2002)

1. Appeal and Error— partial summary judgment—certification—phrase “final judgment”—not necessary

Plaintiff's claims were subject to dismissal (but were heard in the discretion of the Court of Appeals) where plaintiff appealed more than 30 days from entry of a partial summary judgment for defendants. Although plaintiff's notice of appeal was within 30 days of an amendment that added “final judgment” to the order, whether an order is final is determined by the resolution of the claim rather than the phrase “final judgment.”

2. Emotional Distress— intentional inflection—sexual harassment—behavior juvenile but not extreme

The trial court did not err by granting summary judgment for defendants on a claim for intentional infliction of emotional distress (IIED) involving alleged workplace sexual harassment where the alleged behavior was annoyingly juvenile, obnoxious, and offensive, but not outrageous and extreme.

3. Emotional Distress— negligent inflection—sexual harassment by co-worker—no breach of duty

The trial court did not err by granting summary judgment for defendants on plaintiff's claim for negligent infliction of emotional distress (NIED) arising from alleged workplace sexual harassment where plaintiff did not allege a duty owed to her by the co-employee who was allegedly harassing her. While NIED does not require extreme and outrageous conduct, negligence involves the breach of a duty.

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4. Employer and Employee— negligent retention and supervision—underlying tort

The trial court did not err by granting summary judgment for defendant employer on a claim for negligent retention and supervision of an employee accused of sexually harassing plaintiff where there was no viable tort claim against the employee.

5. Employer and Employee— civil assault—sexual harassment—ratification

The trial court erred in a sexual harassment action by granting summary judgment for the employer on a claim for civil assault where the evidence was sufficient to create a genuine issue of material fact regarding ratification.

Appeal by plaintiff from order entered 14 March 2001 by Judge Steve A. Balog in Orange County Superior Court. Heard in the Court of Appeals 17 April 2002.

Patterson, Harkavy, & Lawrence, L.L.P., by Martha A. Geer, and Davis, Murrelle & Lyles, by Edward L. Murrelle, for plaintiff-appellant.

Kathryn P. Fagan, for defendant-appellants.

BIGGS, Judge.

Plaintiff (Linda Guthrie) appeals from a summary judgment order entered 14 March 2001 in favor of defendants (Raymond Conroy and Clegg's Termite and Pest Control, Inc.). For the reasons that follow, we affirm in part and reverse in part.

Plaintiff was employed in 1998 by defendant Clegg's Termite and Pest, Inc. (Clegg's), as a secretary. Defendant Conroy was plaintiff's co-employee, and worked for Clegg's as a salesman and pesticide technician. On 17 March 1999, plaintiff submitted her resignation from Clegg's, in a letter stating that her departure was due to her medical problems, the side effects of various medications, and her feeling that it was unfair for her co-workers to have to "put up with [her] condition." Plaintiff suffered from severe rheumatoid arthritis for which she took numerous medications, some with adverse side effects. However, plaintiff was persuaded not to leave and remained at Clegg's for two more months. On 20 May 1999, plaintiff submitted a second resignation letter, this one stating that she was quitting in

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order to escape sexual harassment by defendant Conroy. She then ceased working for defendant Clegg's.

On 5 October 1999, plaintiff filed suit against defendants, alleging (1) intentional infliction of emotional distress (IIED) by both defendants; (2) negligent infliction of emotional distress (NIED) by both defendants; (3) negligent retention and supervision of Conroy by defendant Clegg's; and (4) civil assault by both defendants. Plaintiff sought compensatory and punitive damages, and attorneys' fees. Defendants filed a summary judgment motion on 26 September 2000, which was heard in November, 2000. On 13 November 2000, the trial court issued an order granting partial summary judgment; the court dismissed all of plaintiff's claims, except for her civil assault action against defendant Conroy. Plaintiff appeals from the grant of summary judgment in favor of defendants.

Motion to Dismiss Appeal

[1] On 7 March 2001, plaintiff filed a motion "pursuant to rule 54(b) and rule 60," asking the trial court to amend its 13 November 2000 summary judgment order by adding the phrase "final judgment." Plaintiff asserted that without that phrase, the order was interlocutory and not subject to immediate appeal. On 9 March 2001, the trial court entered an amended summary judgment order making the same rulings as its 13 November order, and adding the phrase "final judgment." Plaintiff appealed from the amended order on 20 March 2001.

On 15 June 2001, defendants filed a motion in this Court seeking dismissal of plaintiff's appeal. Defendants argue that the 13 November 2000 summary judgment order was immediately appealable, and that plaintiff was required by N.C.R. App. P. 3(c) to give notice of appeal within 30 days of its entry. We agree.

We note initially that plaintiff has argued that, by failing to appeal from the amended order of 9 March 2001, or to file a cross-assignment of error, defendants waived the right to move for dismissal of plaintiff's appeal. However, defendant's motion for dismissal presents a question of jurisdiction, which may be addressed by this Court at any time, *sua sponte*, regardless of whether defendants properly preserved it for appellate review. *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980) ("if an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question . . . has not been raised by the parties themselves").

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The summary judgment order from which plaintiff appeals is interlocutory, because it leaves unresolved plaintiff's claim against Conroy for civil assault. *Creech v. Ranmar Props.*, 146 N.C. App. 97, 551 S.E.2d 224 (2001) (order that leaves claims unresolved is interlocutory). An interlocutory order is subject to immediate appeal only under two circumstances: where the order is final as to some claims or parties, and the trial court certifies pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure that there is no just reason to delay the appeal, see *Alford v. Catalytica Pharmaceuticals, Inc.*, 150 N.C. App. 489, 564 S.E.2d 267 (2002), or where the order deprives the appellant of a substantial right that would be lost unless immediately reviewed, see *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000).

Thus, if the trial court enters a judgment "which fully terminates" a claim or claims as to "fewer than all the parties," Rule 54(b) allows the trial court to "release it for immediate appeal before the litigation is complete as to all claims or all parties" by certifying that there is "no just reason for delay." *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 490, 251 S.E.2d 443, 446-47 (1979). This is the mechanism by which the trial court expresses its determination that a final judgment should be subject to immediate appeal. *Oestreicher v. Stores*, 290 N.C. 118, 127, 225 S.E.2d 797, 803 (1976) (citation omitted) (trial court functions as a "dispatcher" and determines "the appropriate time when each 'final decision' upon 'one or more but less than all' of the claims in a multiple claims action is ready for appeal").

The trial court's 13 November 2000 summary judgment order states that "pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, the undersigned Judge hereby finds that there is no just reason for delay in the plaintiff's taking an appeal from this Order." Plaintiff cites no cases holding that the trial court is also required to use the phrase "final judgment," and we find none. It is the resolution of a claim, rather than the phrase "final judgment" that determines whether an order is 'final.' *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979) ("That the trial court declared it to be a final, declaratory judgment does not make it so."). Nor does N.C.G.S. § 1A-1, Rule 54 require the phrase "final judgment" to be included in a trial court's certification that an order resolving one or more claims is appropriate for immediate appeal:

- (a) Definition. A judgment is either interlocutory or the final determination of the rights of the parties.

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(b) . . . When more than one claim for relief is presented in an action, . . . or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal[.]

N.C.G.S. § 1A-1, Rule 54(a) and (b).

The 13 November 2000 summary judgment order was a final judgment as to all of plaintiff's claims against Clegg's, and on all of her claims against Conroy, except for civil assault. Further, the trial court certified, pursuant to N.C.G.S. § 1A-1, 54(b) that there was "no just reason for delay," of an appeal from the order. We conclude, therefore, that the order was properly certified for immediate appeal.

Because the 13 November 2000 order was subject to appeal, plaintiff was required by N.C.R. App. P. 3(c)(1) to file notice of appeal within 30 days of entry of judgment, or no later than 13 December 2000. Plaintiff's notice of appeal, filed 20 March 2001, or 127 days after entry of the 13 November 2000 summary judgment order, was untimely, and subjects her appeal to dismissal. *Herring v. Branch Banking & Trust Co.*, 108 N.C. App. 780, 424 S.E.2d 925 (1993). However, this Court will exercise its discretion and grant *certiorari* to review plaintiff's claims on their merits, pursuant to N.C.R. App. P. 21 (2001). See *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) ("Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by *certiorari* even if the party has failed to file notice of appeal in a timely manner").

Standard of Review

Preliminarily, we note that plaintiff characterizes her suit as "a conventional sexual harassment case;" compares the conduct at issue to that "in other sexual harassment cases;" and asserts that defendant Conroy's alleged conduct "constitutes classic sexual harassment that should not be tolerated in any workplace." We therefore find it necessary to clarify the nature of the matters before us on review.

We recognize that the right to be free of sexual harassment in the workplace is addressed in certain federal statutes, *e.g.*, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (2001) (prohibiting discrimination in the "terms, conditions, or privileges of employment" on the basis of an employee's sex), and is implicated in

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our State declaration of public policy, N.C.G.S. § 143-422.2 ("It is the public policy of this State to protect . . . the right . . . of all persons to seek, obtain and hold employment without discrimination or abridgement on account of . . . sex"). A civil suit may be brought to redress, *e.g.*, an alleged violation of Title VII, *see Brown v. Henderson*, 155 F. Supp.2d 502 (M.D.N.C. 2000) (setting out elements of Title VII claim of hostile work environment caused by sexual harassment); *Russell v. Buchanan*, 129 N.C. App. 519, 500 S.E.2d 728, *disc. review denied*, 348 N.C. 501, 510 S.E.2d 655 (1998) (employee suit alleging violation of Title VII and N.C. public policy). Such claims focus on the impact of alleged behavior on the workplace, and require proof that the sexual harassment was "so severe or pervasive as to alter the conditions of [the victim's] employment and create an abusive working environment." *Clark County School Dist. v. Breedon*, 532 U.S. 268, 270, 149 L. Ed. 2d 509, 513 (2001) (citation omitted).

However, the plaintiff in the present case does not allege violation of these or other similar statutes. Rather, she has brought common law tort claims for personal injury caused by IIED and NIED. The elements and legal prerequisites of her claims are quite different from those of a Title VII claim. For example, as this is not a statutory "sexual harassment case," plaintiff need not exhaust administrative remedies before bringing her action. *Brooks v. Southern Nat'l Corp.*, 131 N.C. App. 80, 86, 505 S.E.2d 306, 310 (1998), *disc. review denied*, 350 N.C. 592, 536 S.E.2d 626 (1999) (plaintiff not required to exhaust administrative remedies where alleged common law torts are not subject to administrative review). Further, plaintiff's claims of IIED and NIED present issues as to whether the named defendants committed certain acts against this plaintiff; however, plaintiff's claims do not involve a generalized assessment of acceptable workplace behavior, nor an analysis of the "workplace environment." In short, plaintiff has brought a common law tort action alleging personal injury, which we will treat as such.

Plaintiff appeals from the trial court's grant of summary judgment. Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, 56(c) (2001). "[T]he party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citation omitted). However,

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“the real purpose of summary judgment is to go beyond or to pierce the pleadings and determine whether there is a genuine issue of material fact.” *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972). In response to a motion for summary judgment, the non-movant must “produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.” *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000).

On appeal, this Court’s standard of review involves a two-step determination of whether (1) the relevant evidence establishes the absence of a genuine issue as to any material fact, and (2) either party is entitled to judgment as a matter of law. *Von Viczay v. Thoms*, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000), *aff’d*, 353 N.C. 445, 545 S.E.2d 210 (2001) (citations omitted). Moreover, “the evidence presented by the parties must be viewed in the light most favorable to the non-movant.” *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

Intentional Infliction of Emotional Distress

[2] Plaintiff argues first that the trial court erred in its grant of summary judgment for defendants on plaintiff’s claim of intentional infliction of emotional distress (IIED). We disagree.

The essential elements of IIED are “(1) extreme and outrageous conduct by the defendant (2) which is intended to and does in fact cause (3) severe emotional distress.” *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992) (citation omitted). “The determination of whether the conduct alleged was intentional and was extreme and outrageous enough to support such an action is a question of law for the trial judge,” *Lenins v. K-Mart Corp.*, 98 N.C. App. 590, 599, 391 S.E.2d 843, 848 (1990), and, thus, our review is conducted *de novo*, see *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999) (upon challenge to summary judgment order, trial court’s “alleged errors of law are subject to *de novo* review”).

“A claim for intentional infliction of emotional distress exists ‘when a defendant’s conduct exceeds all bounds usually tolerated by decent society[.]’” *Watson v. Dixon*, 130 N.C. App. 47, 52-53, 502 S.E.2d 15, 19-20 (1998), *on reh’g*, 132 N.C. App. 329, 511 S.E.2d 37 (1999), *aff’d*, 352 N.C. 343, 532 S.E.2d 175 (2000) (quoting *Stanback v. Stanback*, 297 N.C. 181, 196, 254 S.E.2d 611, 622 (1979)) (defendant engaged in extreme and outrageous conduct when he “frightened and

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humiliated [plaintiff] with cruel practical jokes, which escalated to obscene comments and behavior of a sexual nature, . . . finally culminating in veiled threats to her personal safety"). Conduct is extreme and outrageous when it is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Briggs v. Rosenthal*, 73 N.C. App. 672, 677, 327 S.E.2d 308, 311, *cert. denied*, 314 N.C. 114, 332 S.E.2d 479 (1985).

Plaintiff cites *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986), for her assertion that "North Carolina courts have consistently held that sexual harassment constitutes extreme and outrageous conduct intended to cause emotional distress." However, *Hogan* held that a claim for intentional infliction of emotional distress might in appropriate factual circumstances be based upon behavior of a sexual nature. The Court concluded that one of the *Hogan* plaintiffs was entitled to submit her IIED claim to the jury based upon her allegations that

[defendant] made sexually suggestive remarks to her while she was working, coaxing her to have sex with him and telling her that he wanted to "take" her. He would brush up against her, rub his penis against her buttocks and touch her buttocks with his hands. When she refused his advances, he screamed profane names at her, threatened her with bodily injury, and on one occasion, advanced toward her with a knife and slammed it down on a table in front of her.

Id. at 490, 340 S.E.2d at 121. The Court upheld summary judgment against the two other plaintiffs, on the basis that the defendant's alleged behavior towards those plaintiffs was not "outrageous and extreme." *Id.* at 493-94, 340 S.E.2d at 123. Thus, while a claim of IIED may be based upon allegations of sexually harassing behavior, "extreme and outrageous behavior" must be more than "mere insults, indignities, and threats." Further, "plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate or unkind." *Hogan, id.* See *e.g., Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 378 S.E.2d 232, *disc. review allowed*, 325 N.C. 270, 384 S.E.2d 513, (1989), *review dismissed as improvidently granted*, 326 N.C. 356, 388 S.E.2d 769 (1990) (*prima facie* case of IIED shown where defendant asked plaintiff "how tight [her vagina] was"; indicated that he wanted plaintiff's "long legs wrapped around his body";

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grabbed his penis; implied that if plaintiff would have sex with him, [he] would place [her] in another position), and *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 181, 527 S.E.2d 712, 715, *disc. review denied*, 352 N.C. 357, 544 S.E.2d 563 (2000) (defendant “physically assaulted plaintiff, . . . [demanding] sexual relations . . . [and] began masturbating, ultimately ejaculating upon plaintiff’s clothing”); *compare with Wilson v. Bellamy*, 105 N.C. App. 446, 468, 414 S.E.2d 347, 359, *disc. review denied*, 331 N.C. 558, 418 S.E.2d 668 (1992) (rejecting IIED claim where “defendants engaged in kissing and heavy petting with the plaintiff in the presence of others” while plaintiff was intoxicated to the point of unconsciousness).

“Because the forecast of evidence as to the factual basis of each [claim of IIED] is unique, each claim must be decided on its own merits.” *Denning-Boyles v. WCES, Inc.*, 123 N.C. App. 409, 412, 473 S.E.2d 38, 40 (1996) (quoting *Hogan* at 490, 340 S.E.2d at 121). However, our review of the relevant case law indicates that claims of IIED based upon allegations of sexual harassment generally have included one or more of the following: an unfair power relationship between defendant and plaintiff; explicitly obscene or “X rated” language; sexual advances towards plaintiff; statements expressing desire to engage in sexual relations with plaintiff, or; defendant either touching plaintiff’s private areas or touching any part of the plaintiff’s body with his private parts. *See, e.g., Poole v. Copland, Inc.*, 348 N.C. 260, 498 S.E.2d 602 (1998) (obscene language; sexual advances; defendant unzips pants and grabs his crotch while making vulgar suggestions to plaintiff); *Waddle v. Sparks*, 331 N.C. 73, 414 S.E.2d 22 (1992) (obscene references to plaintiff’s private parts; vulgarity; harasser was plaintiff’s supervisor); *Denning-Boyles*, 123 N.C. App. 409, 473 S.E.2d 38 (vulgarity; sexual advances); *Ruff v. Reeves Brothers, Inc.*, 122 N.C. App. 221, 468 S.E.2d 592 (1996) (obscene suggestions; defendants held plaintiff while pulling up her shirt, and, on another occasion, held plaintiff while pulling her legs apart; sexual advances); *Bryant v. Thalhimer Brothers, Inc.*, 113 N.C. App. 1, 437 S.E.2d 519 (1993), *disc. review denied*, 336 N.C. 71, 445 S.E.2d 29 (1994) (vulgar sexual language; threatening behavior; “rubbed his penis across [plaintiff’s] hand”); *Burlington Industries*, 93 N.C. App. 431, 378 S.E.2d 232 (sexual advances; genital contact; defendant was plaintiff’s supervisor); *Hogan*, 79 N.C. App. 483, 340 S.E.2d 116 (sexual advances by supervisor; genital contact; vulgar language).

In contrast, the evidence in the case *sub judice*, taken in the light most favorable to the plaintiff, tends to show that defendant Conroy

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engaged in the following behavior: (1) held plaintiff from behind, and touched or rubbed her neck and shoulders; (2) “irritated” her by placing a lampshade on her head when fell asleep with her head on her desk; (3) threw potting soil and water on plaintiff while she was planting flowers at work, remarking when he threw a cup of water on plaintiff that he’d “always wanted to see [her] in a wet T shirt”; and (4) placed a Styrofoam “peanut” and other small objects between the legs of a “naked man” statuette that plaintiff displayed on her windowsill at work and asked her “how she liked it” with the addition.

Plaintiff contends that “[c]omparable conduct has been found sufficient to justify sending the claim to the jury.” However, we conclude that defendant Conroy’s alleged behavior, while annoyingly juvenile, obnoxious, and offensive, does not rise to the level of “outrageous and extreme” as the term has been interpreted and applied in tort actions alleging IIED. We note that Conroy was not plaintiff’s supervisor or workplace superior; that he did not swear or employ obscene language; that he referred to nothing more vulgar than a “wet T shirt”; that although he gave plaintiff a “shoulder rub” against her wishes, he never expressed any interest in sexual activity with plaintiff; and that, notwithstanding allegations in plaintiff’s complaint that defendant dropped items down the front of her blouse, the only specific instance of this behavior she described was his throwing potting soil at her while she planted flowers. This Court does not condone defendant’s behavior. However, in the context of the tort claims that plaintiff brought against defendants, we conclude that defendant Conroy’s behavior was not “atrocious, and utterly intolerable in a civilized community” or “extreme and outrageous.” We further conclude that, because plaintiff failed to present evidence of this essential element of her claim, the trial court did not err in granting summary judgment for defendant Conroy on plaintiff’s IIED claim.

Plaintiff also brought claims of IIED against defendant Clegg’s, basing their alleged liability on a theory of respondeat superior, and arguing that Clegg’s ratified Conroy’s tortious behavior. However, having concluded that defendant Conroy did not engage in the alleged tortious behavior, we necessarily conclude that plaintiff has no claim against defendant Clegg’s for ratification. *Denning-Boyles*, 123 N.C. App. at 413, 473 S.E.2d at 41 (“liability of [employee] is essential if [employer] is to be held responsible under a theory of respondeat superior”).

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For the reasons discussed above, we conclude that the trial court did not err by granting summary judgment for defendants on plaintiff's claims of NIED.

Negligent Infliction of Emotional Distress

[3] Plaintiff argues next that the trial court erred in granting summary judgment for defendants on her claims of negligent infliction of emotional distress (NIED). We disagree.

The elements of NIED are “(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as ‘mental anguish’), and (3) the conduct did in fact cause the plaintiff severe emotional distress.” *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990).

Negligence is the breach of a legal duty owed by defendant that proximately causes injury to plaintiff. *Tise v. Yates Construction Co.*, 345 N.C. 456, 480 S.E.2d 677 (1997). “In order to establish actionable negligence, a plaintiff must show that: (1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligenc[t] breach of such duty was the proximate cause of the injury.” *Gordon v. Garner*, 127 N.C. App. 649, 661, 493 S.E.2d 58, 65 (1997), *disc. review denied*, 347 N.C. 670, 500 S.E.2d 86 (1998). “A duty is defined as an obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.” *Davis v. N.C. Dept. of Human Resources*, 121 N.C. App. 105, 112, 465 S.E.2d 2, 6 (1995), *disc. review denied*, 343 N.C. 750, 473 S.E.2d 612 (1996) (citation omitted).

Plaintiff correctly states that NIED may be predicated upon negligent conduct, and does not require proof of extreme and outrageous conduct, and further argues that “even if Conroy’s conduct was not outrageous and extreme, it was sufficient to constitute [NIED].” However, plaintiff alleges no duty that Conroy owed plaintiff, and no evidence was presented of a breach of any duty of care owed by Conroy to plaintiff. Absent a breach of duty of care, plaintiff’s suit against Conroy for NIED cannot be maintained. See *Fox-Kirk v. Hannon*, 142 N.C. App. 267, 273, 542 S.E.2d 346, 352, *disc. review denied*, 353 N.C. 725, 551 S.E.2d 437 (2001) (NIED claim requires proof of negligent act by defendant).

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Moreover, the liability of defendant Clegg's for negligence is predicated upon tortious behavior of Conroy, and is derivative of Conroy's commission of tortious acts. *Hogan*, 79 N.C. App. at 495, 340 S.E.2d at 124 ("before the employer can be held liable, plaintiff must prove that the incompetent employee committed a tortious act resulting in injury to plaintiff"); *Barnes v. McGee*, 21 N.C. App. 287, 289, 204 S.E.2d 203, 205 (1974) ("judgment on the merits in favor of the employee precludes any action against the employer where, as here, the employer's liability is purely derivative"). Thus, because we have upheld the trial court's grant of summary judgment on plaintiff's IIED and NIED claims against defendant Conroy, defendant Clegg's cannot be liable for NIED based upon Conroy's behavior. We conclude, therefore, that the trial court did not err by granting summary judgment in favor of both defendants on plaintiff's claim of NIED.

Negligent Retention and Supervision

[4] Absent a viable tort claim against Conroy, plaintiff cannot maintain an action against Clegg's for negligent retention and supervision of Conroy. *McLain*, 137 N.C. App. at 190, 527 S.E.2d at 720 (where there is "no liability on the part of [employee], plaintiff's claims against [employer] asserting ratification of [employee's] actions and negligent retention of [employee] may not be [maintained]"); *Hogan*, 79 N.C. App. at 496-97, 340 S.E.2d at 125 (where "the evidence is insufficient to establish that . . . [plaintiffs have] been injured by actionable tortious conduct of an employee of defendant, neither of them may maintain an action against defendant based upon its negligence in employing or retaining the allegedly incompetent employee"). We conclude, therefore, that the trial court's grant of summary judgment on plaintiff's NIED and IIED claims against Conroy precludes defendant Clegg's liability for negligence in supervising and retaining Conroy in regard to those claims.

Ratification of Civil Assault

[5] Plaintiff also assigns error to the trial court's grant of summary judgment on defendant Clegg's liability for the alleged civil assault by Conroy, and contends that evidence was presented of Clegg's liability on the theory of ratification.¹ The civil assault was the only claim to survive defendants' motion for summary judgment.

1. Although plaintiff also argues that Clegg's was liable for its negligent retention or supervision of Conroy as regards his alleged civil assault, this claim was not made in plaintiff's complaint and, therefore, is not considered by this Court. *Elliott v. Owen*, 99 N.C. App. 465, 472, 393 S.E.2d 347, 351 (1990) (where "plaintiff has failed to raise

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Ratification has been defined by this Court as “the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account,” and “may be inferred from failure to repudiate an unauthorized act . . . or from conduct . . . inconsistent with any other position than intent to adopt the act.” *American Travel Corp. v. Central Carolina Bank*, 57 N.C. App. 437, 442, 291 S.E.2d 892, 895, *disc. review denied*, 306 N.C. 555, 294 S.E.2d 369 (1982) (citation omitted). To establish that an employer has ratified an employee’s actions, it must be shown that the employer had “full knowledge of all the material facts,” *American Travel, id.*, or had “knowledge of facts which would lead a person of ordinary prudence to investigate further.” *Denning-Boyles*, 123 N.C. App. at 415, 473 S.E.2d at 42 (citation omitted). Further, “[t]he jury may find ratification from any course of conduct on the part of the principal which reasonably tends to show an intention on his part to ratify the agent’s unauthorized acts[,] and “[s]uch course of conduct may involve an omission to act.” *Burlington Industries*, 93 N.C. App. at 437, 378 S.E.2d at 236 (citation omitted).

In the instant case the evidence, taken in the light most favorable to the plaintiff, tends to show that in August, 1998, plaintiff complained to her supervisor, Joseph Joy, that defendant Conroy had placed a Styrofoam ‘peanut’ between the legs of a nude ‘action hero’ doll that plaintiff displayed on her windowsill; Joy indicated he had not personally witnessed the incident, and took no further action. At some point during the next few months, when plaintiff had laid her head down on her desk, Conroy placed a lampshade on her head. Instead of disciplining Conroy for this behavior, Joy laughed and asked plaintiff if she had “a new hat.” According to plaintiff, she next complained in January, 1999, when she contacted company management in Durham, and told an administrator that she was “having trouble with one of the technicians,” but did not identify Conroy. The administrator requested that she allow Clegg’s “local management” to resolve the problem. Plaintiff then discussed Conroy’s behavior with Joy, who told her he would “handle it.” However, Joy’s interventions, if any, were insufficient to prevent Conroy from continuing to bother plaintiff. In April, 1999, she again called the Durham office to complain, this time telling them the details of various incidents. The following day Clegg’s owner, Phil Clegg, flew to Morehead City, where he convened a meeting of the entire staff of plaintiff’s office to review the company’s policy against sexual harassment. Clegg warned his

issue] . . . in her complaint . . . [the] contention is not properly before [appellate court]”).

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employees that sexual harassment “would not be tolerated” by the company. However, shortly after the staff meeting, while plaintiff was planting flowers at work, another incident occurred in which Conroy threw potting soil in plaintiff’s hair, and also got her wet while they were watering the flowers, prompting his remark that he’d “always wanted to see [her] in a wet T shirt.” Joy was made aware of the incident, but he took no disciplinary action. When Clegg’s administrators called plaintiff to follow up on the staff meeting and inquire whether the situation was resolved, plaintiff reported the flower-planting incident. In response, a Clegg’s administrator returned to their office. This time, the office was remodeled to place a privacy wall around plaintiff’s desk, and Conroy was formally reprimanded. Thereafter, Conroy “stayed away” from plaintiff.

We conclude that plaintiff’s evidence regarding the response of Joy, her immediate supervisor, to Conroy’s behavior is sufficient to create a genuine issue of material fact regarding Clegg’s ratification of Conroy’s alleged civil assault against plaintiff. Moreover, given the evidence that Clegg’s directed plaintiff to “let local management handle” the problem, we conclude that Joy’s failure to intervene raises a genuine issue of material fact as to the company’s ratification. *See Burlington Industries*, 93 N.C. App. 431, 378 S.E.2d 232 (jury question presented regarding company’s ratification of defendant’s actions, notwithstanding company’s eventual discharge of defendant, where plaintiff’s immediate supervisor took no action for two years). We conclude that the trial court erred in granting summary judgment on the issue of Clegg’s ratification of Conroy’s alleged civil assault against plaintiff.

We hold that the trial court did not err in entering summary judgment for defendants on plaintiff’s claims of IIED and NIED, and on her claim against Clegg’s for negligent retention or supervision as regards IIED and NIED; accordingly, these portions of the court’s order are affirmed. We further hold that the trial court erred by granting summary judgment for defendant Clegg’s on plaintiff’s claim that Clegg’s ratified the alleged civil assault by Conroy, and that part of the trial court’s order is reversed.

Affirmed in part, reversed in part.

Judges WYNN and McCULLOUGH concur.

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[152 N.C. App. 29 (2002)]

STATE OF NORTH CAROLINA v. TIMOTHY GLENN SMITH

No. COA01-963

(Filed 6 August 2002)

1. Homicide— short-form indictment—constitutional

The short form murder indictment is constitutional.

2. Evidence— other crimes or acts—integral part of offense

The trial court did not err in a prosecution for first-degree murder, armed robbery, and first-degree burglary by allowing defendant's wife to testify about his actions the day before, the day of, and the day after the murder, burglary, and robbery. The events of that weekend form an integral and natural part of the account of the crime and are necessary to complete the story of the crime for the jury. Moreover, the State sought to establish as a motive stealing to support a crack habit.

3. Evidence— hearsay—statements by murder victim—present sense impression

The trial court did not err in a prosecution for first-degree murder, armed robbery, and first-degree burglary by admitting the testimony of a pawn shop employee about statements made by the victim during a confrontation with defendant in the pawn shop. The statements were made as the victim witnessed the events and were therefore admissible as a present sense impression. N.C.G.S. § 8C-1, Rule 803(1).

4. Evidence— murder victim's statements—observation of victim's mental state—not present sense impression

The trial court did not err in a prosecution for first-degree murder, armed robbery, and first-degree burglary by admitting the testimony of the victim's daughter and niece regarding statements the victim made after a pawn shop confrontation over stolen goods where the statements were not sufficiently immediate to be a present sense impression, but were admissible as non-hearsay testimony relating the witnesses' observation of the mental state of the victim. N.C.G.S. § 8C-1, Rule 701.

5. Evidence— videotape of murder victim—admissible

The trial court did not err in a prosecution for first-degree murder, armed robbery, and first-degree burglary by admitting a videotape of the corpse and the area where it was found. After a

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voir dire, the court limited the playing of the tape before the jury, and a witness testified at trial that the videotape was an accurate description of the body as he found it and answered eight questions about the crime scene. The tape was not admitted solely to arouse the passions of the jury.

6. Constitutional Law— effective assistance of counsel—failure to object to videotape

Defense counsel did not provide ineffective assistance of counsel in a prosecution for first-degree murder, armed robbery, and first-degree burglary by not objecting to the admission of a videotape of the body and not requiring the State to authenticate the videotape.

7. Criminal Law— instructions—duress

The trial court did not err in a prosecution for first-degree burglary and armed robbery by denying defendant's request for an instruction on duress where defendant had ample opportunity to avoid participation and made no attempt to contact police or surrender the stolen goods.

8. Criminal Law— instructions—doctrine of recent possession

The trial court did not err by instructing the jury on the doctrine of recent possession in a prosecution for burglary and robbery where defendant maintained that there was significant evidence of intervening agency. By its nature, the doctrine involves a gap in the evidence of possession of the stolen goods.

Appeal by defendant from judgment entered 4 October 2000 by Judge Thomas W. Seay, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 15 May 2002.

Roy Cooper, Attorney General, by Francis W. Crawley, Special Deputy Attorney General, for the State.

Bowen, Berry, Powers and Slaughter, PLLC, by Sue Genrich Berry, for defendant-appellant.

THOMAS, Judge.

Defendant, Timothy Glenn Smith, appeals from convictions of first-degree murder, robbery with a dangerous weapon, and first-degree burglary.

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Defendant sets forth nine assignments of error. For the reasons herein, we find no error.

The State's evidence tends to show the following: On 19 January 1999, defendant pawned a skill saw and socket wrench at Bryant's Gun and Pawn. They had been stolen from Ethel Mae Todd, defendant's seventy-two-year-old landlord. Ms. Todd went to the pawn shop the next day in search of the items, with defendant walking in while she was still there. He redeemed the items upon her demand, but then an argument erupted. Defendant told Ms. Todd, "I'll get you one way or another." Ms. Todd informed defendant he had to move out of the mobile home he rented from her within fifteen days.

Shortly thereafter, defendant, his wife Linda Smith, and five-year-old son moved out of the mobile home. Ms. Smith's cousin, Shelby Grant, and her husband Billy Grant, helped the Smiths move their belongings. Mr. Grant testified that during the moving, defendant, referring to Ms. Todd, said, "I will get even with that bitch; I will kill her."

Ms. Todd called her daughter, Paula Lee Todd, the same day as the pawn shop incident and explained what had occurred. To calm her mother, Paula Todd stayed at her mother's home every weekend thereafter until the weekend of 10 and 11 April 1999. Ms. Todd was killed in her home sometime during the late night hours of Sunday, 11 April 1999, or early morning hours of Monday, 12 April 1999.

Prior to Ms. Todd's death, but during the same weekend, defendant tied up his wife with a telephone cord and threatened to kill her with an ice pick after she asked him about their missing VCR. Defendant then forced his wife and son to ride with him to buy crack cocaine, which he purchased using money taken from Ms. Smith's wallet. At one point, defendant drove back home, retrieved a different VCR, sold it to a woman for twenty dollars, and used the money to buy even more crack cocaine. During these events, defendant repeatedly threatened to kill his wife with a knife. On that Sunday, defendant sold more items from the home, including the washer and dryer. Thereafter, Ms. Smith took their son and left. She pressed charges the next day against defendant for assault, with defendant being arrested and spending Monday night in jail.

On Monday morning, employees of a paving company saw the naked body of an elderly woman in a sitting position on the side of the road in Robeson County. After determining she was dead, they contacted law enforcement. The body was that of Ms. Todd. Her head had

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received blows to the side and around the face. Four stab wounds had penetrated her chest, damaging the heart and left lung.

State Bureau of Investigation Agent Domingo A. Isasi went to defendant's home and interviewed him there on Tuesday, 13 April 1999. Defendant told him that he and his family had eaten lunch at his parent's on Sunday, he and his wife had argued, and shortly after they returned home, the Grants arrived. His wife then left with the Grants. He further stated that he went to sleep Sunday around 10 p.m. and was awakened early the next morning when someone came by to take him to work. However, he decided not to go.

Isasi left without arresting defendant.

On Friday, 16 April 1999, defendant asked a co-worker to ride with him to his home to unload some items from his car. Once there, defendant asked the co-worker if he wanted to move in with him. When the co-worker replied that he did not, defendant said, "Why, you don't want to live with a murderer?" The same day, due to inconsistencies discovered in defendant's statement, Isasi again interviewed defendant. Confronted with the inconsistencies, defendant stated that everyone was lying except him. Defendant was then arrested for the murder of Ms. Todd.

While being processed at the police station after his arrest, defendant said he wanted to make another statement. Defendant was advised of his *Miranda* rights, and he then admitted that after selling the washer and dryer, he went with Michael Moore to purchase drugs. Moore lived in Ms. Todd's mobile home park. Afterwards, he said, he returned home and went to sleep. Defendant stated several times that he did not remember killing "that lady."

Approximately an hour later, defendant told Isasi he would like to give another statement. Defendant said that on Monday, 12 April 1999, he used money from selling his washer and dryer to purchase and smoke crack cocaine with Moore. He rode with Moore to Ms. Todd's home because Moore wanted to get rent money back from her. While defendant stayed in the van, Moore kicked down Ms. Todd's door. Defendant then walked into the house and saw Moore stabbing Ms. Todd with a hunting knife. Defendant tried to stop him, but was overpowered. Moore threatened to kill defendant's wife and son if defendant said anything.

Defendant continued to explain that Moore put Ms. Todd's body in the trunk of the car, made defendant drive to a wooded area, and

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placed the body on the side of the road. They then went back to Ms. Todd's house, where Moore took three guns from a gun rack and made defendant take jewelry from the bedroom. Defendant walked home after Moore told him to go there, wait, and not call anyone. About thirty minutes later, Moore drove to defendant's home and gave defendant a ring and some crack cocaine. He again told defendant not to tell anyone about what had happened. Sometime later, Moore returned to defendant's home and gave him the guns and a watch that he wanted defendant "to get rid of." Defendant sold the ring the next day for ten dollars. He also sold the guns to his supervisor at work because, he said, it was what Moore wanted.

Defendant's evidence tends to show that Ms. Todd was not satisfied with his explanation that he pawned her items only because he needed extra money during the week and intended to redeem them on Friday. She ordered him to leave her park, and defendant agreed to move within fifteen days. He did not threaten her in any way.

On 10 April 1999, defendant saw his wife at the home of an ex-boyfriend. They discussed the situation but defendant denied striking, tying up, or threatening Ms. Smith.

After returning from his mother's home, defendant's family found the Grants in their driveway. The Grants took the Smith's son with them and Ms. Smith went to her mother's. When Ms. Smith did not return home later in the day, defendant went to retrieve his son from the Grants. No one was there. Upon returning home, defendant found his wife and Ms. Grant removing some items.

To keep his wife from getting the washer and dryer, defendant sold them to his neighbor for \$100.00. He purchased cocaine with some of that money. He and Moore used the cocaine together. Moore then decided to get back his rent money from Ms. Todd. The rest of defendant's evidence comports with his last statement to Isasi.

Defendant was convicted in a jury trial and sentenced to life imprisonment without parole for first-degree murder; 117 to 150 months for robbery with a dangerous weapon to be served at the expiration of the life sentence; and 117 to 150 months for first-degree burglary to be served at the expiration of the sentence imposed for robbery. He appeals.

[1] By his first, second, and third assignments of error, defendant contends the charge of first-degree murder should be dismissed because the short-form murder indictment is constitutionally insuffi-

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cient to charge him with the crime. He maintains it fails to allege all of the elements of murder, specifically, premeditation, deliberation, and a specific intent to kill. As a result, defendant argues, when the trial court tried him for first-degree murder it: (1) lacked jurisdiction; and (2) violated his constitutional rights.

Defendant acknowledges that this precise issue has been decided against his position. See *State v. Braxton*, 352 N.C. 158, 174, 531 S.E.2d 428, 437 (2000) (holding the short-form murder indictment constitutional under both the North Carolina and United States Constitutions), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *State v. Wallace*, 351 N.C. 481, 504-08, 528 S.E.2d 326, 341-43 (same), *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000), *reh'g denied*, 531 U.S. 1120, 148 L. Ed. 2d 784 (2001); *State v. Nolen*, 144 N.C. App. 172, 186, 550 S.E.2d 783, 792 (same), *appeal dismissed and disc. review denied*, 354 N.C. 368, 557 S.E.2d 531 (2001). Additionally, in *State v. Braxton*, our Supreme Court also held that the short-form murder indictment authorized by N.C. Gen. Stat. § 15-144 (2001) gives a defendant notice that he is charged with first-degree murder and that the maximum penalty to which he could be subject is death. *Braxton*, 352 N.C. at 175, 531 S.E.2d at 438. Nonetheless, defendant asks this Court to reexamine the issue. As we are bound by the decisions of the Supreme Court, see *Rogerson v. Fitzpatrick*, 121 N.C. App. 728, 732, 468 S.E.2d 447, 450 (1996), as well as those already decided by other panels of this Court, see *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989), we refuse to do so. Accordingly, we overrule these assignments of error.

[2] By his fourth assignment of error, defendant contends the trial court erred in allowing his wife to testify about his actions the day before, of, and after the murder, burglary, and robbery. We disagree.

Rule 404(b) provides that evidence of other offenses is inadmissible if its only relevancy is to “prove the character of a person in order to show that he acted in conformity therewith.” N.C. Gen. Stat. § 8C-1, Rule 404(b) (2001). The Rule is one of inclusion, and thus only requires the exclusion of evidence if its sole probative value is to show that the defendant has the propensity to commit an offense of the nature of the crime charged. *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Rule 404(b) explicitly lists motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident, as purposes for which evidence may be admissible. N.C. Gen. Stat. § 8C-1, Rule 404(b). Although not enumer-

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ated in Rule 404(b) itself, evidence may also be admitted to establish a chain of circumstances leading up to the crime charged:

Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.

State v. Agee, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (quoting *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985)).

Here, the testimony of Ms. Smith establishes that defendant acted abusively toward her, repeatedly threatening, first with an ice pick and then a knife, to “take her out.” This behavior began after she confronted him about a missing VCR. She further testified that after purchasing some crack cocaine with money from her wallet, defendant sold a different VCR from their home and used that money to buy more crack cocaine. These events started on Saturday, 10 April, and continued through Monday, 12 April, which was the day of or following Ms. Todd’s murder.

We find no error in the admission of this testimony because it “pertained to the chain of events explaining the context, motive, and set-up of the crime.” *Agee*, 326 N.C. at 548, 391 S.E.2d at 174. The events of that particular weekend form an “integral and natural part of an account of the crime,” and are “necessary to complete the story of the crime for the jury.” *Id.* Moreover, the State sought to establish that, besides revenge, defendant had a motive for going to Ms. Todd’s home. He intended to steal objects he could sell for cash to support his crack cocaine habit. See N.C. Gen. Stat. § 8C-1, Rule 404(b). Accordingly, we reject this assignment of error.

[3] By his fifth assignment of error, defendant argues that the trial court erred in allowing inadmissible hearsay testimony of Paula Todd, Ms. Todd’s niece Shirley Huggins, and a pawn shop employee, regarding statements Ms. Todd made while in the pawn shop with defendant and statements made later concerning the incident. We disagree.

Ms. Todd’s statements in the presence of the pawn shop employee were properly allowed into evidence as a present sense impression by the declarant. This exception to the hearsay rule is defined as follows:

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(1) Present Sense Impression—A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

N.C. Gen. Stat. § 8C-1, Rule 803(1) (2001). “The basis of the present sense impression exception is that closeness in time between the event and the declarant’s statement reduces the likelihood of deliberate or conscious misrepresentation.” *State v. Pickens*, 346 N.C. 628, 644, 488 S.E.2d 162, 171 (1997).

The pawn shop employee testified about Ms. Todd’s statements to defendant after she found her stolen tools in the shop. Ms. Todd demanded that defendant pay for the tools and move out. She also told him several times, “Shut up,” or “Hush.” These statements were made as Ms. Todd witnessed the events, and therefore were admissible under the present sense impression exception.

[4] Paula Todd, meanwhile, testified that her mother called her at work on the day of the incident. She said her mother was very disturbed and quivering when she said, “Honey, I can’t believe someone would do this to me,” that they would have “broken in.” According to Paula Todd, Ms. Todd told her that “a deputy had stayed with her all afternoon because he had felt for her safety.”

Ms. Todd did not make these statements while she was perceiving the event. Therefore, they would be required to qualify as being made “immediately thereafter.” There is no bright line rule regarding what time interval is too long to be “immediately thereafter;” admissibility depends on the facts of each case. *State v. Clark*, 128 N.C. App. 722, 725, 496 S.E.2d 604, 606 (1998). In *Clark*, the witness observed her son’s behavior, and then walked next door to her daughter-in-law’s house to tell her about it. The Court held that the statements were sufficiently close in time to be considered “immediately thereafter.” *See id.*

Here, the record indicates only that Ms. Todd’s statements were made the same day as the event, but after a police officer had stayed with her all afternoon. Under these facts, they would not qualify as being made “immediately [a]fter” the event, as required by Rule 803(1), and were therefore not admissible under this hearsay exception.

Likewise, the testimony of Huggins also does not come under Rule 803(1). There is no indication in the record regarding when Ms.

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Todd spoke to her niece about the incident, except that the two spoke "almost daily." Moreover, Huggins did not testify about any statements Ms. Todd made regarding the incident. Rather, she testified only that her aunt had told her about the incident and that it "made her nervous and upset her."

The testimony of both witnesses, however, is admissible *non-hearsay* testimony. Rule 701 of the North Carolina Rules of Evidence provides:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701 (2001). Our courts have long held that: "The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence." *State v. Leak*, 156 N.C. 643, 647, 72 S.E.2d 567, 568 (1911) (quoting John Jay McKelvey, *Handbook of the Law of Evidence* § 132 (rev. 2d ed. 1907)). Therefore, Paula Todd and Huggins were permitted to testify, based on their personal observations, about the mental state of Ms. Todd shortly after the pawn shop confrontation.

[5] By defendant's sixth assignment of error, he contends the trial court committed plain error in allowing the jury to view a videotape of Ms. Todd and the area surrounding her body. He argues: (1) the videotape is unnecessarily gruesome; and (2) a proper foundation was not shown for its admission. Defendant raises these arguments for the first time on appeal. Therefore, we review them for plain error. N.C.R. App. P. 10(c)(4).

Plain error is "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or . . . grave error which amounts to a denial of a fundamental right of the accused[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *U.S. v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). In order to prevail under a plain error analysis, a defendant must show: (1) there was error; and (2) without this error, the jury would probably have

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reached a different verdict. *State v. Faison*, 330 N.C. 347, 361, 411 S.E.2d 143, 151 (1991).

In determining whether to admit photographic evidence, the trial court must weigh the probative value of the photographs against the danger of unfair prejudice to a defendant. N.C. Gen. Stat. § 8C-1, Rule 403 (2001). Such evidence, however gruesome, is admissible if it serves to illustrate the testimony of a witness, and so long as an excessive number of photographs are not used solely to arouse the passions of the jury. *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988).

The requirement that the offeror lay a proper foundation for a videotape can be met by:

(1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed (illustrative purposes); (2) “proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape . . .”; (3) testimony that “the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing,” (substantive purposes); or (4) “testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area ‘photographed.’ ”

State v. Cannon, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608-09 (1988), *rev’d on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990). Here, the trial court conducted a *voir dire* concerning the admission of the tape. Defendant’s counsel, who had previously viewed the tape and made a written motion opposing its admissibility on the basis that it was gruesome and inflammatory, objected during the *voir dire*. The trial court then viewed a portion of the tape, asked if that was all that would be shown to the jury, ordered no volume to be played, and ruled the portion of the tape admissible “if it illustrates and explains the testimony.”

John Collins then testified that he found a naked woman’s body in a sitting position on top of metal bars on the side of a road. He stated that the videotape, which he had previously viewed, was an accurate depiction of how he found the body. He then used the tape while answering eight “yes or no” questions regarding the location of objects and the body at the crime scene. Accordingly, it was not admitted into evidence “solely to arouse the passions of the jury.” *Id.*

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We hold that the videotape, offered and received solely for illustrative purposes, met the test enunciated in *Cannon*.

[6] By defendant's seventh assignment of error, he contends his trial counsel provided ineffective assistance of counsel by failing: (1) to object to the videotape at trial; and (2) to require the State to authenticate the videotape. Defendant claims he was prejudiced by the viewing of the videotape and was further prejudiced by the more strenuous plain error analysis applied to the previous assignment of error. We disagree. As a result of our holding that there was no error regarding the use of the videotape, defendant is also unable to meet his burden of showing that counsel was ineffective, or fell below an objective standard of reasonableness. See *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and that they were so serious as to deprive defendant of a fair trial) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984)).

[7] By his eighth assignment of error, defendant contends the trial court erred as a matter of law in denying defendant's request to instruct the jury on the defense of duress to the charges of first-degree burglary and robbery with a dangerous weapon because he claims Moore forced him to commit the crimes. He maintains the evidence establishes the elements of the defense. We disagree.

"In order to have the court instruct the jury on the defense, the defendant must present some credible evidence on every element of the defense." *State v. Henderson*, 64 N.C. App. 536, 540, 307 S.E.2d 846, 849 (1983).

[T]o constitute a defense . . . the coercion or duress must be present, imminent or impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. Furthermore, the doctrine of coercion cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm.

State v. Kearns, 27 N.C. App. 354, 357, 219 S.E.2d 228, 230-31 (1975), *disc. review denied*, 289 N.C. 300, 222 S.E.2d 700 (1976). Moreover, once the crimes were committed under duress and the defendant was out from under Moore's coercive influence, defendant had a duty to

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surrender himself and the stolen goods to the police. *Henderson*, 64 N.C. App. at 540, 307 S.E.2d at 849. Defendant must satisfy this element as well before he is entitled to an instruction on the defense of duress. *Id.*

Here, the evidence, considered in defendant's favor, shows that he had ample opportunity to avoid participation with Moore in the burglary and robbery, "without undue exposure to death or serious bodily harm." Defendant stated that he knew Moore was going to Ms. Todd's house to get money. Rather than flee, defendant sat in the van while Moore kicked in the kitchen door and went inside. Defendant himself then went inside and witnessed the stabbing. While Moore was tying up the victim, defendant did not leave. Instead, he stood and watched until Moore came over to him and, with a knife, threatened to kill defendant and his family. Defendant made no attempt to leave while they disposed of the body, and then assisted Moore in taking the guns and jewelry. Finally, he made no attempt to contact the police or surrender the stolen goods, but instead sold them. Accordingly, defendant's evidence fails to establish the defense of duress and we reject this assignment of error.

[8] By his final assignment of error, defendant contends the trial court erred in instructing the jury on the doctrine of recent possession regarding the burglary and robbery charges. We disagree.

It is well established that the "possession of stolen property recently after the theft, and under circumstances excluding the intervening agency of others, affords presumptive evidence that the person in possession is himself the thief, and the evidence is stronger or weaker, as the possession is nearer to or more distant from the time of the commission."

State v. Joyner, 301 N.C. 18, 28, 269 S.E.2d 125, 132 (1980) (quoting *State v. Patterson*, 78 N.C. 470, 472-73 (1878)). Here, the uncontradicted evidence shows that defendant was present during the burglary and robbery of Ms. Todd's home and that he sold the three guns on Monday and the ring on Tuesday. Nevertheless, defendant maintains the instruction was erroneous because there was significant evidence of the intervening agency of Moore. In *State v. Warren*, this Court stated:

By its very nature, the doctrine is useful only when the defendant's guilt cannot be established by direct evidence of his

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presence at the scene of the crime and of his participation therein. Thus, where the doctrine is invoked, there must always be a slight gap in the State's evidence failing to completely account for the possession of the stolen goods at every moment between the actual commission of the crime and the discovery of the goods in a defendant's possession, thereby making it impossible to completely exclude the possibility of some intervening agency.

Warren, 35 N.C. App. 468, 473, 241 S.E.2d 854, 858, *disc. review denied*, 295 N.C. 94, 244 S.E.2d 262 (1978).

We therefore reject defendant's argument.

NO ERROR.

JUDGES WYNN and HUNTER concur.

REGINA SKILLIN, ADMINISTRATRIX OF THE ESTATE OF JAMES BURGESS,
DECEASED EMPLOYEE AND/OR DECEASED SOLE PROPRIETOR, PLAINTIFF V. MAGNA
CORPORATION/GREENE'S TREE SERVICE, INC., EMPLOYER, SELF-INSURED
(GALLAGHER BASSETT SERVICES, INC., ADMINISTRATOR), DEFENDANT

No. COA01-768

(Filed 6 August 2002)

1. Workers' Compensation— work-related injury—degenerative disk disease

The Industrial Commission did not err in a workers' compensation case by concluding that the now deceased employee's degenerative disk disease in his back was a work-related injury that occurred on-the-job when decedent stepped back from a tree he was cutting and into a hole, because: (1) plaintiff administratrix presented lay testimony at the hearing, as well as medical testimony and records from three physicians, that established competent evidence supporting this finding; and (2) even if decedent's injury at work aggravated a pre-existing condition, the resulting disability is nonetheless compensable.

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2. Worker's Compensation— disability—released to return to work

The Industrial Commission did not err in a workers' compensation case by finding that the now deceased employee remained disabled after he was released to return to work on 26 June 1998 by a doctor even though defendant attempted to perform a number of jobs on his own that were outside of his restrictions, because there was competent evidence to support the Commission's finding that defendant employer did not have an actual position available within decedent's work restrictions and that defendant never notified decedent of any job.

3. Workers' Compensation— findings of fact—conclusions of law—credible evidence

Although defendants contend the Industrial Commission erred in a workers' compensation case by failing to base its findings of fact and conclusions of law on credible competent evidence, the full Commission is the sole judge of the weight and credibility of the evidence.

Appeal by defendants from opinion and award entered 8 February 2001 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 14 March 2002.

Root & Root, P.L.L.C., by Louise Critz Root, for the plaintiff-appellee.

McAngus, Goudelock & Courie, P.L.L.C., by John T. Jeffries and Christine Latona, for the defendants-appellants.

HUDSON, Judge.

Defendants appeal from an opinion and award of the North Carolina Industrial Commission (the "Commission") giving workers' compensation benefits to Regina Skillin ("plaintiff") as the administratrix of the estate of James Stanley Burgess ("Burgess" or "decedent"). We affirm.

Relevant to this appeal are the following facts, as found by the Commission. Decedent was a "self-employed independent contractor" who performed tree climbing and other logging services for Greene's Tree Service, Inc. ("Greene's"). Greene's leased employees and subcontractors to Magna Corporation ("Magna"). The parties stipulated that Greene's secured workers' compensation insurance for decedent through Magna, and that Greene's deducted pre-

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mium payments of \$80.03 from decedent's weekly check to cover Greene's purchase of workers' compensation insurance for decedent.¹ Burgess contended that he was injured on or about 6 April 1998, when he stepped back from a tree he was cutting and into a hole. He testified,

I was cutting big pine tree logs that had been marked off into log sections, was sawing through them. And I had finished sawing a log off, and I was just tired from being bent over. It was a big saw that I was working for—with. It was a Huska Varna (phonetic) 394. It was a big saw. And my back was tired and tense. I had my back like in an arched back position, took about two steps and stepped into a rut that wasn't more than maybe a foot and a half. And when I stepped into that rut, it felt like somebody had stabbed me in my back or something—you know, it just—instant pain right then.

Burgess filed a claim for workers' compensation with the Industrial Commission, and Deputy Commissioner Glenn heard the testimony and issued a decision on 17 March 2000 awarding compensation. Defendants appealed. Burgess died on 20 March 2000 and the Commission allowed decedent's mother, Ms. Skillin, as administratrix of his estate to proceed as substituted plaintiff. *See* N.C. Gen. Stat. § 97-37 (2001) ("Where injured employee dies before total compensation is paid."); *see also Wilhite v. Liberty Veneer Co.*, 47 N.C. App. 434, 267 S.E.2d 566 (1980) (holding that a claimant's estate may recover all unrecovered benefits to which the claimant would have been entitled had he lived), *rev'd on other grounds*, 303 N.C. 281, 278 S.E.2d 234 (1981). As plaintiff, decedent's mother also claimed death benefits pursuant to N.C. Gen. Stat. § 97-38 (2001). The Commission entered an Order to stay the proceedings in the claim for death benefits during this appeal.

On 8 February 2001, the Full Commission affirmed an award of compensation to decedent and found as fact:

1. The Workers' Compensation Act expressly provides that an agreement between an employer and employee to deduct workers' compensation premiums from paychecks is not valid and may constitute a misdemeanor. *See* N.C. Gen. Stat. § 97-21 (2001). Here, the Deputy Commissioner found as fact, in spite of the parties' stipulation that decedent was an independent contractor, that he was an employee, and then ordered reimbursement to him of premiums withheld. The Full Commission found that he was an independent contractor, and deleted the reimbursement. Although the record does not reveal any basis (other than the stipulation) for the finding that decedent was an independent contractor, this finding has not been challenged by plaintiff on appeal.

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5. Defendant paid decedent at a rate of \$12.00 per hour. Decedent and the other employees normally worked a 10 hour day four days per week. Decedent normally earned \$384.00 per week for working four days. If decedent worked on Friday or Saturday he was paid \$100.00 cash for each day but this was not reflected on the payroll books of defendant. Defendant did not withhold any deductions from decedent's pay except for \$80.03 per week to cover workers' compensation premiums. Decedent was not paid by the job or at a fixed rate for any of the jobs he performed for defendant. Defendant has not provided a Form 22 or any tax statements indicating decedent's wages.

6. On or about April 6, 1998 decedent was working on a job site, having been sent there by defendant. As he stepped back from a tree he was cutting, he stepped into a hole and when he did he felt immediate pain in his lower back. Decedent continued to work thinking the pain would go away. Decedent completed the job. The next morning plaintiff told Mr. Greene that he thought he might have injured his lower back the day before when plaintiff stepped into a hole as he was cutting a tree.

7. Decedent continued to work at his normal job until the pain became so severe that he was unable to continue to work. When decedent told Mr. Greene that decedent needed to see a doctor, Mr. Greene told him that if decedent went to see a doctor, decedent's workers' compensation premiums would increase.

8. Defendant sent decedent to see Dr. John B. Lange. Dr. Lange initially saw decedent on or about May 7, 1998. Decedent told Dr. Lange that he had injured his back when he had stepped into a hole while walking away from a tree he was cutting, and while he was carrying a chainsaw. Decedent told Dr. Lange that his back had progressively gotten worse since then and he did not get any relief from aspirin. Dr. Lange diagnosed decedent's condition as a low back strain and gave decedent work restrictions. Dr. Lange evaluated decedent as being able to lift up to twenty-five pounds occasionally with no pulling, pushing, bending, or climbing.

9. Decedent's condition continued to worsen and Dr. Lange had an MRI performed. The MRI showed that decedent had a disc herniation with an extruded fragment. When Dr. Lange reviewed the MRI, he changed decedent's restrictions to no squatting, climbing, or reaching if he was lifting, no over-the-shoulder

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work, and no lifting more than five pounds. Dr. Lange evaluated decedent as being able to sit for six hours a day, 30 minutes at a time. Dr. Lange referred decedent to the Blue Ridge Bone & Joint Clinic.

10. Defendant did not have any light duty work within the restrictions given to decedent. Mr. Greene indicated that he had a job for decedent cleaning and sharpening the chainsaws and other equipment, delivering equipment to work sites, and stump removal. Mr. Greene and Ms. Judy B. Allen testified that although this was work that needed to be done, it was not done on a regular basis and was not advertised to the public as a viable position. The maintenance work on chainsaws was normally done when it was raining or there was not other work to be performed by the employees. Stump removal was done approximately 2 to 3 times per week, but the record is unclear regarding the actual time spent per week on stump removal.

11. Although decedent and his medical providers advised defendant of decedent's need for light duty work, defendant did not inform decedent that they had any light duty work for decedent to perform.

...

13. Dr. Harley released decedent to return to light duty work on or about June 26, 1998. Decedent was restricted to no lifting over twenty pounds and no frequent bending. Defendant did not have a job for decedent that was within these restrictions.

...

16. Decedent attempted to do a number of different jobs since last working for defendant. Those jobs included driving a forklift, laying tile, putting in septic tanks, cutting firewood, and other odd jobs. Decedent was paid \$3,734.00 for performing these jobs, and he had to pay \$400.00 for help he needed to perform the jobs, leaving him a net of \$3,334.00 in earnings. Decedent was unable to continue performing any of these jobs due to the pain he experienced while performing them.

17. Decedent continued to have problems with his back and was seen and initially treated by Dr. James Joseph Hoski, an orthopedic surgeon, on March 3, 1999. Decedent told Dr. Hoski of having experienced an injury to his back when he stepped in a

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hole while cutting a tree with a chainsaw. Dr. Hoski reviewed the previously taken MRI film of decedent's back. It was Dr. Hoski's opinion after reviewing the film that decedent suffered a herniated nucleus pulposus at L5-S1, and that the herniation had resulted from the incident when he had stepped in the hole on April 6, 1998.

...

19. When Drs. Harley and Hoski were asked if decedent could have done the various jobs that he performed after his release in June 1998 such as driving a forklift, cutting and hauling firewood, digging holes, setting posts, and doing renovation work on houses with the kind of injury decedent had sustained, neither doctor changed his respective opinion as to decedent's diagnosis or as to decedent's restrictions. Dr. Harley noted that people would sometimes take jobs that they should not have when they had to work for family survival. Dr. Harley went on to say that he thought decedent should have a desk job in which decedent was not lifting at all, but he did not think that such a position would be made available to decedent.

The Full Commission concluded that decedent was entitled to benefits and that:

2. Decedent sustained a compensable injury by accident arising out of and in the course of his employment on or about April 6, 1998. N.C. Gen. Stat. 97-2(6).

3. Decedent's average weekly wage on April 6, 1998 was \$384.00 per week, which yields a compensation rate of \$256.01 per week. N.C. Gen. Stat. 97-29.

4. Plaintiff is entitled to receive temporary total disability benefits at the rate of \$256.01 per week from May 7, 1998 and continuing until March 20, 2000, the date of decedent's death. Defendant is entitled to a credit in the amount of \$3,334.00 for the wages decedent earned after May 7, 1998 and is not obligated to pay plaintiff compensation during the period decedent was incarcerated. N.C. Gen. Stat. 97-29. Parker v. Union Camp, 108 N.C. App. 85, 422 S.E.2d 585 (1992).

5. Decedent was entitled to receive medical benefits for so long as they affected a cure, gave relief and/or lessened decedent's period of disability. N.C. Gen. Stat. 97-25.

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The Commission awarded, in addition to costs and a twenty-five percent attorney's fee, the following:

1. Subject to attorney's fees hereinafter awarded, defendant shall pay to plaintiff temporary total disability benefits at the rate of \$256.01 per week from May 7, 1998 and continuing thereafter until March 20, 2000. All accrued compensation shall be paid in one lump sum. Defendant is entitled to a credit in the amount of \$3,334.00 that shall be deducted from this amount. No compensation benefits are owing to decedent for the period of decedent's 10-day incarceration.

2. Defendant shall pay for all medical expenses incurred by decedent as a result of the compensable injury to the extent that such evaluations, treatments and examinations were required to effect a cure, give relief and/or lessen decedent's period of disability.

Defendants appeal.

On review of a decision of the Commission, we are "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). An appellate court reviewing a workers' compensation claim "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999).

The Full Commission is the "sole judge of the weight and credibility of the evidence." *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. Furthermore,

the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. Requiring the Commission to explain its credibility determinations and allowing the Court of Appeals to review the Commission's explanation of those credibility determinations would be inconsistent with our legal system's tradition of not requiring the fact finder to explain why he or she believes one

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witness over another or believes one piece of evidence is more credible than another.

Id. at 116-17, 530 S.E.2d at 553. Additionally, in making its determinations, the Commission "is not required . . . to find facts as to all credible evidence. That requirement would place an unreasonable burden on the Commission. Instead the Commission must find those facts which are necessary to support its conclusions of law." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 602, 532 S.E.2d 207, 213 (2000) (internal quotation marks omitted) (alteration in original); see N.C. Gen. Stat. § 97-86 (2001). Moreover, the Commission must "make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends." *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977).

[1] In their first argument, defendants contend that the Commission erred in finding that decedent sustained a work-related injury. Defendants argue that decedent has not met his burden of proving that his injury was work-related, and that the evidence indicates that his back problems were merely the aggravation of a pre-existing degenerative back condition. Defendants contend that the medical evidence presented at trial and found as fact in the Commission's findings 9, 17, and 19 is speculative and should have been disregarded by the Commission. We disagree.

The plaintiff in a workers' compensation claim does bear the burden of proving that his injury was work-related. See *Gibbs v. Leggett and Platt, Inc.*, 112 N.C. App. 103, 107, 434 S.E.2d 653, 656 (1993). Here, the plaintiff presented lay testimony at the hearing, as well as medical testimony and records from three physicians, Drs. Lange, Harley, and Hoski.

Dr. Lange testified that he first saw decedent 7 May 1998, decedent gave him a description of his injury consistent with his testimony at the hearing, and Dr. Lange diagnosed decedent's condition as low back strain. Doctor Lange restricted decedent's work to an "occasional 25-pound lift, that he was to do no pulling or pushing, no bending, or climbing. . . . There were restrictions on reaching and overhead work." At the time, Dr. Lange prescribed two muscle relaxants for decedent to help him sleep while in pain. Dr. Lange saw decedent again on 15 May 1998 and found that decedent's low back strain was accompanied by radicular complaints. On 18 May 1998, decedent reported to Dr. Lange such increased pain and back problems, that Dr. Lange ordered a "prompt MRI." On 3 June 1998, Dr. Lange changed

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decedent's restrictions to no "squatting, climbing, reaching if he was lifting, any over-the-shoulder work and not to lift more than five pounds; that he could sit for as much as six hours a day, half hour at a time." After the MRI, Dr. Lange diagnosed decedent with a disk herniation with an extruded fragment, which would most likely require surgery. This undisputed testimony was reflected in the Commission's findings of fact numbers 8 and 9.

Dr. Lange then referred decedent to Dr. Harley, an orthopedic spine surgeon. Dr. Harley testified that he first saw the decedent on 12 June 1998, and that decedent reported the April incident as the cause of his injury. Decedent told Dr. Harley that he had experienced back pain in the past, but that it had never been as severe as it was at that time. Dr. Harley reviewed decedent's MRI and found "quite severe disk degeneration at L5-S1 with an associated disk bulge. There was also some degeneration at 4-5, though with less narrowing. . . . L2 was also slightly degenerated." He found evidence of posterior bulging in the disk, but no evidence of a compressed nerve. He diagnosed decedent with "degenerat[ed] disk disease in his back associated with the on-the-job injury." Dr. Harley also testified that decedent "probably had some back symptoms before the injury. Clearly the injury made him worse." However, Dr. Harley could not say for certain that his condition existed before the injury or whether the injury caused the condition. Dr. Harley testified that decedent had reached "maximum improvement" in that "there is not a whole lot else that I can do and [he was] relatively comfortable" and "if he had a light job, he probably could return to work." Dr. Harley released decedent from his care on or about 26 June 1998 with work restrictions. Dr. Harley's testimony was reflected in the Commission's findings of fact numbers 12, 13, and 19.

Dr. Hoski, an orthopedic surgeon, testified that he saw decedent for the first time on 3 March 1999. Again, decedent described the April incident as causing his injury. Dr. Hoski diagnosed decedent as having "a herniated nucleus pulposus of the bottom disk, L5-S1." He testified that "[b]ased on the history taken and the medical records that were available, [he] felt within a reasonable degree of medical probability that [decedent's] problems were due to his work-related injury of April 9th, 1998." Dr. Hoski specifically disagreed with Dr. Harley's assessment that decedent could have had "preexisting degenerative disk disease" because "[t]o degenerate is to age. To call it a disease means that it's abnormal. If [decedent] didn't have problems with it, it really wasn't degenerative disk disease; it was a—it

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was an aging change." Dr. Hoski opined that decedent could perform a sedentary job with negligible lifting of weight and, that as of 2 August 1999, decedent could not return to his job with Greene's. Dr. Hoski's testimony is reflected in the Commission's findings of fact numbers 17 and 19.

In determining whether the Commission's findings of fact are supported by any competent evidence, we note that the Commission is "the sole judge of the credibility of the witness and the weight to be given its testimony." *Weaver v. American National Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996) (internal citations and quotations omitted). Here, the Commission gave Dr. Hoski's opinion significant weight in determining what produced decedent's condition. See e.g., *Chapman v. Southern Import Co.*, 63 N.C. App. 194, 196, 303 S.E.2d 824, 825 (1983) ("If there is evidence of substance which directly or by reasonable inference tends to support the findings, the Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary."). Dr. Hoski clearly stated that in his opinion, decedent's back problems were the result of his work-related injury. Even Dr. Harley indicated that if decedent had some preexisting back pain, as alleged by the defendants, "[c]learly the injury made him worse." It is well-established that even if decedent's injury at work aggravated a pre-existing condition, the resulting disability is nonetheless compensable. See *Wilder v. Barbour Boat Works*, 84 N.C. App. 188, 352 S.E.2d 690 (1987). Applying the appropriate standard of review, we find that the Commission's findings of fact establishing that decedent suffered a work-related injury are supported by competent evidence.

Next, we examine whether the findings of fact support the Commission's conclusions of law. Findings of fact numbers 6, 7, 8, 9, and 17, among others, specifically describe decedent's injury, its effects, and his medical history subsequent to that incident. These findings support the Commission's conclusion of law number 2 that decedent suffered a compensable work-related injury. Because it found that decedent sustained a work-related injury, the Commission acted properly in concluding that decedent was entitled to an award of benefits pursuant to N.C. Gen. Stat. §§ 97-25 & 97-29 (2001).²

2. We question whether there is any statutory authority for the Commission's conclusion that "[d]efendant is entitled to a credit in the amount of \$3,334.00 for the wages decedent earned after May 7, 1998" working for employers other than defendant. See N.C. Gen. Stat. § 97-42 (2001). However, because the plaintiff has not cross-assigned error to this issue, we need not resolve it.

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Plaintiff has carried the burden of proving that he sustained a work-related injury and, thus, we reject defendants' first argument.

[2] In their second argument, defendants contend that the Commission erred in finding that decedent remained disabled after he was released to return to work on 26 June 1998 by Dr. Harley. Defendants argue that Greene's offered decedent positions within his restrictions, but that decedent refused to return to work. Defendants contend that because decedent's refusal to work was unjustified, he is barred from recovering workers' compensation benefits during that period of time. Again, we are "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. Defendants' contentions here are based on the Commission's findings of fact numbers 9, 10, 11, 12, 13, 14, and 16. However, in these findings the Commission found that after receiving Dr. Lange's restrictions, Greene's "did not have any light duty work within the restrictions given to decedent. . . . Although decedent and his medical providers advised [Greene's] of decedent's need for light duty work, [Greene's] did not inform decedent that they had any light duty work for decedent to perform." Decedent then saw Dr. Harley, who eventually "released decedent to return to light duty work on or about June 26, 1998. Decedent was restricted to no lifting over twenty pounds and no frequent bending. [Greene's] did not have a job for decedent that was within these restrictions."

We believe that the testimony at the hearing before the Deputy Commissioner provides "competent evidence" to support these findings. For example, Mr. Greene of Greene's testified that there was no specific full-time maintenance position, but that workers were able to keep the equipment maintained by working when it rained. In addition, he testified:

Q. Okay. When [decedent] saw you whenever and said he wanted to come back and work, you didn't say "Come on down. We've got a job for you," did you?

A. No, I didn't.

Q. Okay. You haven't written or called him offering him work, then, since then, have you?

A. No.

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Mr. Greene testified that the job in the shop was not one that was ever advertised to the public, because it was a job performed by employees who required only a couple of days of recuperation for some minor injury.

Mr. Greene's administrative assistant, Judy Allen, also testified that Greene's had light duty work available within decedent's restrictions. However, on cross-examination, Ms. Allen admitted that another employee was already doing this work, and that the company did not have full-time light duty jobs available. Ms. Allen also testified that she attempted to let decedent know that she had some light duty work by calling his mother and speaking to his sister, but she admitted that she neither spoke directly to decedent, nor sent him written notification of available work. In sum, there is competent evidence to support the Commission's finding that Greene's did not have an actual position available within decedent's work restrictions, and that they never notified him of any job. The Commission made the following additional findings of fact:

14. In July and August 1998, in exchange for rent, decedent and his family members did repair work to a house in which he and his family were living. Decedent had two minor children in his custody.

15. Following his injury, decedent began to receive welfare benefits because he was unable to work and support his family and himself.

16. Decedent attempted to do a number of different jobs since last working for [Greene's]. Those jobs included driving a forklift, laying tile, putting in septic tanks, cutting firewood, and other odd jobs. Decedent was paid \$3,734.00 for performing these jobs, and he had to pay \$400.00 for help he needed to perform the jobs, leaving him a net of \$3,334.00 in earnings. Decedent was unable to continue performing any of these jobs due to the pain he experienced while performing them.

Decedent attempted to perform a number of jobs on his own as found by the Commission in finding of fact number 16, even though the jobs were outside of his restrictions. These findings are fully supported by the testimony at the hearing. Defendants' second argument has no merit.

[3] Finally, defendants contend that the Commission did not base its findings of fact and conclusions of law on credible "competent" evi-

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dence. Again, the Full Commission is the “sole judge of the weight and credibility of the evidence.” *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. “When the Commission’s findings of fact are supported by competent evidence, they are binding on the reviewing court in spite of the existence of evidence supporting contrary findings.” *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). Defendants would have this Court reexamine the credibility of witnesses and re-weigh the evidence despite the clearly established standard of review; this we decline to do. We reject defendants’ third argument.

We hold that the Commission considered the evidence appropriately, made sufficient findings of fact, drew proper conclusions of law based thereon, and entered an appropriate award. Accordingly, we affirm the opinion and award.

Affirmed.

Judges MARTIN and THOMAS concur.

SHARON DAVIS, PLAINTIFF V. TORIAN LEWIS McMILLIAN, DEFENDANT

No. COA01-887

(Filed 6 August 2002)

1. Child Support, Custody, and Visitation— custody—judicial notice from prior custody action between biological parents—action between biological parent and non-parent

The trial court did not err in a child custody case by taking judicial notice under N.C.G.S. § 8C-1, Rule 201(b) of findings of fact of unfitness from a prior custody action between the biological parents to support an award of custody in this action in favor of plaintiff non-parent second cousin and against defendant biological mother, because: (1) any past circumstance or conduct which would impact either the present or the future of a child is relevant, notwithstanding the fact that such circumstance or conduct did not exist or was not being engaged in at the time of the custody proceeding; and (2) an actual court determination based on a preponderance of the evidence from a prior proceeding must

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be considered since a trial court must consider testimonial evidence which only meets the test of relevancy.

2. Child Support, Custody, and Visitation— custody—findings of fact—competent evidence

The trial court's findings of fact supporting the conclusion of defendant biological mother's unfitness in a child custody case between defendant biological mother and plaintiff non-parent second cousin were supported by competent evidence, because: (1) an emergency medical technician and another squad worker both testified about the bad conditions at defendant's home when they came to attend to the minor child's seizure due to a high fever, and the minor child was found dehydrated and lying in a soiled diaper; (2) although her child had a multitude of medical problems, defendant could not testify on the details of the child's care and sicknesses; (3) witnesses testified that on separate instances, defendant rode her minor child in a vehicle without a car seat; (4) the trial court considered the earlier determination made by a preponderance of the evidence that defendant was unfit; (5) the record shows that defendant is unable to take on normal adult responsibilities such as acquiring a driver's license, getting and maintaining a job, taking care of her living expenses, and providing complete care of her older son who currently resides in her home; and (6) defendant has never given plaintiff any child support for her minor child that has resided with plaintiff.

3. Child Support, Custody, and Visitation— custody—conclusions of law

A trial court's conclusions of law in a child custody case resulting in the custody to plaintiff non-parent second cousin over defendant biological mother were supported by the findings of fact, because: (1) defendant is not able to adequately care and provide for the minor child and is not able to properly see to the needs of the child; (2) the earlier determination that defendant was unfit as well as the evidence presented at the subject hearing support the conclusion that her actions were inconsistent with her protected status as a parent; and (3) the record contains evidence that it was in the child's best interest to remain with plaintiff, and plaintiff has never denied defendant access to the child.

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Appeal by defendant from order entered 25 January 2001 by Judge Thomas Aldridge, Jr. in District Court, Craven County. Heard in the Court of Appeals 24 April 2002.

McGougan Law Firm, by Paul J. Ekster and Willis Harper, Jr., for plaintiff-appellee.

William L. Davis, III, for defendant-appellant.

WYNN, Judge.

Biological mother Torian Lewis McMillian, presents the following issues on appeal from an order awarding custody of her child to non-parent Sharon Davis: (I) Did the trial court err by taking judicial notice of findings of fact from a prior custody action between the biological parents to support an award of custody in this action between the biological mother and a non-parent? (II) Were the findings of fact which supported the trial court's conclusion of unfitness supported by competent evidence? (III) Were the trial court's conclusions of law resulting in the award of custody to a non-parent supported by findings of fact? We affirm the trial court's award of custody.

Ms. McMillian is the biological mother of a minor child born in 1998; Ms. Davis is the child's second cousin. In a prior custody action during 1999 between Ms. McMillian and the child's biological father, George Ronald Manuel, the trial court found Ms. McMillian unfit to have custody of her minor child; accordingly, the trial court granted custody to Mr. Manuel with visitation by Ms. McMillian. Mr. Manuel died on 16 October 2000; thereafter, his first cousin, Ms. Davis, brought this action and obtained an *ex parte* order for custody of the minor child who, along with Mr. Manuel, had lived with Ms. Davis for over two years. At the temporary custody hearing, the trial court incorporated the findings of fact on Ms. McMillian's unfitness adjudicated in the 1999 action, and awarded temporary custody to Ms. Davis. On 23 January 2001, the trial court granted Ms. Davis primary care, custody, and control of the minor child, and allowed Ms. McMillian visitation. This appeal followed.

(I)

[1] On appeal, Ms. McMillian argues that the trial court erroneously took judicial notice of findings from a prior custody action between the biological parents to support an award of custody to a non-parent in this action. We must disagree because our Supreme Court recently

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set forth “that any past circumstance or conduct which could impact either the present or the future of a child is relevant, notwithstanding the fact that such circumstance or conduct did not exist or was not being engaged in at the time of the custody proceeding.” *Speagle v. Seitz*, 354 N.C. 525, 531, 557 S.E.2d 83, 87 (2001), *reh’g denied*, 355 N.C. 224, 560 S.E.2d 138, *cert. denied*, 122 S.Ct. 2589, 70 U.S.L.W. 3656 (2002).

Under Rule 201 (b) of the North Carolina Rules of Evidence, “a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” N.C. Gen. Stat. § 8C-1, Rule 201(b) (2001). “No decisions in North Carolina specifically indicate that it is improper for a trial court to use orders from temporary hearings or contempt hearings in the same case to support permanent custody orders. This Court has found that it is not improper for a trial court to take judicial notice of earlier proceedings in the same cause.” *Raynor v. Odom*, 124 N.C. App. 724, 728, 478 S.E.2d 655, 657 (1996) (the trial court took judicial notice of earlier proceedings of temporary custody orders, as evidence in awarding custody in the same case between biological parents and intervening grandparents); *see also In re Byrd*, 72 N.C. App. 277, 324 S.E.2d 273 (1983).

Most recently, in *Speagle v. Seitz*, our Supreme Court confronted an appeal by grandparents who sought a reversal of this Court’s holding that the biological mother of a minor child had not lost her constitutionally protected status as a parent because there existed “no evidence the biological mother was engaging in any conduct inconsistent with her protected status in August 1998, the date of the custody trial, or any time soon before that trial.” *Speagle v. Seitz*, 141 N.C. App. 534, 537, 541 S.E.2d 188, 190 n. 1 (2000). In that case, the grandparents argued that although the biological mother had been acquitted for the murder of their son (the biological father), the trial court should have considered testimonial evidence claiming that the biological mother was involved in the murder of their son.

Our Supreme Court agreed stating: “[W]e consider this issue important in the development of our law in custody proceedings.” *Speagle v. Seitz*, 354 N.C. at 531, 557 S.E.2d at 87. The Court continued by disagreeing with the inference contained in the Court of Appeals’ decision that custody proceedings, unlike termination of parental rights proceedings, cannot and should not be concerned

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with past circumstances or past actions and conduct of a parent when determining custody as between parents and non-parents. Instead the Supreme Court held:

We conclude that any past circumstance or conduct which could impact either the present or the future of a child is relevant, notwithstanding the fact that such circumstance or conduct did not exist or was not being engaged in at the time of the custody proceeding.

Id.

The character of the evidence that our Supreme Court allowed in the *Speagle* case especially compels the result we reach in determining that the evidence in this case was admissible. In *Speagle*, our Supreme Court found “the logic and authority set forth in *Simpson v. Brown*, 67 Cal. App. 4th 914, 79 Cal. Rptr. 2d 389 (1998), to be compelling.”

As a matter of case law, as well as common sense, the question of whether one parent has actually murdered the other is about as relevant as it is possible to imagine in any case involving whether the surviving parent should be allowed any form of child custody.

Speagle, 354 N.C. at 532, 557 S.E.2d at 87 (*quoting Simpson* at 925-26). In *Simpson*, the trial court allowed evidence in a custody case from an unrelated civil wrongful death action that was determined by a jury to have been proven by a preponderance of the evidence. However, in *Speagle*, the character of the evidence was that of the testimony of a witness whose lone testimony implicated the biological mother in the murder of the biological father. Thus, while *Speagle* distinguished the proof required in a criminal trial (reasonable doubt) from that required in a child custody proceeding (preponderance) the evidence allowed in *Speagle* was based only on the relevance of the testimony, not a determination by a prior proceeding that it had been proven by a preponderance nor by any independent due process proceeding such as a “mini-trial” at the custody proceeding.

In the case *sub judice*, the trial court considered the 1999 custody determination of unfitness to support the award of custody to Ms. Davis. That determination, unlike the naked testimonial evidence sanctioned in *Speagle*, was a court-made determination in which the parties had been afforded due process and the trial judge had found

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by a preponderance of the evidence that the mother was unfit. Since under *Speagle*, a trial court must consider testimonial evidence which only meets the test of relevancy, then most assuredly, an actual court determination based on a preponderance of the evidence from a prior proceeding must be considered. Thus, we must reject this assignment of error.

(II)

[2] Ms. McMillian next argues that the trial court's findings of fact supporting the conclusion of unfitness were not supported by competent evidence. We disagree.

In a child custody case, the trial court's findings of fact are binding on this Court if they are supported by competent evidence. *See Sain v. Sain*, 134 N.C. App. 460, 464, 517 S.E.2d 921, 925 (1999). "However, the findings of fact and conclusions of law must be sufficient for this Court to determine whether the judgment is adequately supported by competent evidence." *Cantrell v. Wishon*, 141 N.C. App. 340, 342, 540 S.E.2d 804, 805 (2000); *see Buckingham v. Buckingham*, 134 N.C. App. 82, 88-89, 516 S.E.2d 869, 874, *review denied*, 351 N.C. 100, 540 S.E.2d 353 (1999). "Generally, on appeal from a case heard without a jury, the trial court's findings of fact are conclusive if there is evidence to support them, even though the evidence might sustain a finding to the contrary." *Raynor v. Odom*, 124 N.C. App. 724, 729, 478 S.E.2d 655, 658 (1996).

In the present case, Ms. McMillian argues that the following findings of fact were not sufficiently supported by the evidence:

9. The Court takes judicial notice of the following facts contained in the prior Orders of the Court entered in Case Number 98-CVD-1358 where the Defendant in this action and the child's deceased father were the parties in an action for custody.

10. Specifically, the Court finds based upon that Order that between November of 1998 after the birth of the child and the first week of January 1999, the Defendant left the State of North Carolina and temporarily resided in Pennsylvania and New York until returning to the State of North Carolina with the minor child. On or about April 19 of 1999, the Defendant again left the State of North Carolina with the minor child. On April 20, 1999, in File Number 98-CVD-1358, the Honorable Napoleon B. Barefoot, Jr. entered an Order. In that Order, the presiding judge found that the above referred to case was scheduled for hearing on April 19,

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1999. The mother of the child, Torian McMillian, hereinafter referred to as the Defendant, and her witnesses were not present in court until after 10:30 a.m. on that date. In the presence of the Plaintiff and the Defendant and their attorneys, the Court announced that this matter would be heard on its merits at 2:00 p.m. on April 20, 1999. The matter came on for hearing on that date and at that time the Defendant failed to appear at the hearing. The Court heard evidence and testimony and made detailed findings with regard to the fitness of Mr. George Manuel to have the care, custody, and control of the minor child. The Court specifically found that at that time the biological father was living with Mrs. Sharon Davis, the cousin of Mr. Manuel, Mrs. Davis's daughter and husband in a three-bedroom, three-bath home. After the birth of the child, Mr. Manuel and Ms. McMillian resided together at the Plaintiff's residence with the child and Mr. Manuel and Mrs. Davis primarily cared for the minor child because Ms. McMillian slept until noon and would not care for the daily needs of the child including feeding and bathing. Based on the findings in that Order, Mr. Manuel was granted temporary custody and further hearing was scheduled for May 17, 1999.

11. At the hearing on May 17, 1999, the Honorable Napoleon B. Barefoot, Jr. entered an Order at that time granting Mr. Manuel permanent care, custody and control over the minor child. In that Order the Court specifically found that North Carolina was the home state of the child. The Court further recited the fact that the Defendant failed to be present at a hearing in April after being duly notified in open court and the Court incorporated the findings of its April 20, 1999 Order into the findings of its May 17, 1999 Order. At that time the Defendant again failed to appear in court for this hearing and was remaining out of the State of North Carolina with the minor child. The Defendant was found to be unfit and not a proper person to be awarded the custody of the child, based on the findings in the April 19 and May 17 orders.

12. In the Court's April 19 Order, the Court found facts incorporated into the May 17, 1999 Order which indicated that the Defendant had not and was not able to properly see to the needs of the child. Specifically, when the minor child was returned to the custody of Mr. Manuel pursuant to an Order of January 12, 1999, the child was ill and suffering from cradle cap. The child had no milk, no diapers, dirty bottles, and the child had on clothing that was urine soaked. Further, the child was suffering from

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diarrhea and vomiting and Mr. Manuel sought medical care. At that time the child was hospitalized for asthma, a severe cold, wheezing, diarrhea and dehydration. Further, the Court specifically found that at a prior hearing the Defendant testified that for the three months she was in Pennsylvania that the child was ill and she did not even know of a location of an emergency room or know the address of the place where she had lived in the State of Pennsylvania.

Ms. McMillian argues that findings 9 through 12 are not specific or detailed enough to support the trial court's determination of Ms. McMillian's fitness at the time of the hearing. We disagree.

At the custody hearing, Teresa Foley, an emergency medical technician, testified that she was called to Ms. McMillian's home on 10 July 2000 because her son was having a seizure due to a high fever. When she arrived at Ms. McMillian's home, she found the child dehydrated and lying in a soiled diaper. She stated that there were no lights in the home for several minutes, the home "smelled like a dog" and dishes were on the counter and sink. Another squad worker, Ruth Williams, presented substantially similar testimony. The record also showed that although her son has had a multitude of medical problems, Ms. McMillian could not testify on the details of his care and sicknesses. Moreover, witnesses testified that on separate instances, Ms. McMillian rode her minor child in a vehicle without a car seat. In addition to this evidence, as previously noted, the trial court also considered the earlier determination made by a preponderance of the evidence that Ms. McMillian was unfit. In light of this evidence and the prior court determination supporting these findings of fact, we uphold the trial court's findings of facts 9 through 12.

Ms. McMillian also challenges the following findings of fact as not being supported by competent evidence:

13. The Defendant mother presently lives on Andrew Jackson Street or Highway in the town limits of Fair Bluff, North Carolina. She resides in a singlewide two-bedroom mobile home, which is an older mobile home. The Defendant was unable to give clear evidence as to the age of the mobile home, although it is centrally heated and air conditioned according to the Defendant's grandmother who gave the mobile home to her granddaughter and titled the mobile home in her granddaughter's name. The mobile home is located on land owned by the grandmother of the Defendant. The Defendant does not have a telephone and does

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not have an account with the power company in her name, in that she owes bills to these utilities. The account for the power is currently in the name of the grandmother. The Defendant was unable to testify and give clear evidence of her knowledge of the cost of the utilities. The Defendant does not own a car and has never had an operator's license in that she has never learned how to drive, although the Defendant appears to be in her late twenties. She has not held full-time employment since 1991 when she worked in housekeeping in the Myrtle Beach, South Carolina area. She is currently involved with a program at Southeastern Community College called JobLink, where she is assisted in looking for employment. She has never been called in for any job interviews through this program. She resides in the two-bedroom mobile home with another child, who is three years and eleven months old and will be referred to herein as Jimmy. Jimmy is an older sibling of the minor child who is the subject of this action. The Defendant receives \$236.00 per month in food stamps and has no other source of income. The Defendant's mother installed a satellite dish at the residence of Defendant and her mother pays that bill. This was installed for the use and benefit of the older child, Jimmy, who lives in the home. The Defendant is very limited in her intellectual functioning. Her extended family of aunts, cousins or grandmother daily go by her residence to check on the Defendant and her four-year-old who lives in the mobile home. The older sibling, Jimmy has some developmental difficulties and is somewhat aggressive or plays rough. There is evidence that Jimmy suffers from many of the same health problems as Chanti and that Jimmy, with the assistance of relatives, has received appropriate medical care and is generally clean, neat and appropriately dressed. The Defendant's minor child, Jimmy, has been transported in motor vehicles without being placed in a child safety seat as required by law. The Defendant mother has also been present in the vehicle on these occasions.

14. In July of 2000, the minor child Jimmy suffered from seizures as a result of a sudden elevation in temperature, apparently due to some type of ear infection. A rescue unit was called to transport the child to the hospital. During the time that the rescue personnel were in the mobile home of the Defendant, there was only one light in the residence, that being a lamp plugged into the wall near the sofa where the child was unconscious. During the time that the rescue personnel were attending the minor child, the

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light went out for some unexplained reason. There was no other source of light in the mobile home and no other lights were turned on.

15. From the birth of the minor child in question until the Defendant removed the minor child from the State of North Carolina, the minor child and the natural father resided with the natural father's cousin, Sharon Davis, Plaintiff in this action. After the Defendant moved from the home sometime after the birth of the child, the Plaintiff and the natural father continued to provide day-to-day care of the child. At that time the Plaintiff was employed full-time and the natural father was at home on a full-time basis taking care of his minor child. After the minor child was returned to the natural father, the natural father and the Plaintiff continued to provide day-to-day care for the minor child and the Plaintiff has continued since the death of the father to raise the child as if she were her own. When necessary, the Plaintiff has transported the child to doctor's appointments and to her daycare. The minor child has her own room in the three-bedroom brick home belonging to Plaintiff. The Plaintiff possesses a commercial driver's license. The Plaintiff sees that the minor child attends church on a regular basis. The Plaintiff is a member of her church choir and works with the Bible School program. The Plaintiff has a high school diploma. The Plaintiff has developed a close bond and relationship with the minor child.

16. The Defendant is not able to adequately care for the minor child, Jimmy, that lives with her except for the assistance of family who provide additional financial help and transportation to and from doctor's appointments and other necessary family trips to the grocery store and other places.

17. The Defendant is not a fit and proper person to have the primary or exclusive care, custody, and control of the minor child in question.

The record shows competent evidence that Ms. McMillian is unable to take on normal adult responsibilities such as acquiring a driver's license, getting and maintaining a job, and taking care of her living expenses, and providing complete care of her son, who currently resides in her home. During her testimony, Ms. McMillian repeatedly made inconsistent statements about her living conditions, work history, and her parenting skills. Ms. McMillian did not give

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information about the home she lived in; she did not have a telephone; and could not have an account for other utilities in her name because she had an outstanding bill with the utility company. Moreover, there was testimony showing that Ms. McMillian is unable to care for her three-year-old son who lives with her, without the constant assistance of her family. Additionally, Ms. McMillian has never given Ms. Davis child support for her minor child. This evidence as well as the consideration by the trial court of the prior determination of unfitness supports findings of fact 13 through 17.

(III)

[3] Ms. McMillian argues lastly that the trial court's conclusions of law resulting in the award of custody to a non-parent were not supported by findings of fact. We disagree.

On appeal, we review a finding of a natural parent's unfitness *de novo* by examining the totality of the circumstances. See *Raynor v. Odom*, 124 N.C. App. at 731, 478 S.E.2d at 659. In *Troxel v. Granville*, 530 U.S. 57, 147 L. Ed. 2d 49 (2000), the United States Supreme Court recognized that natural parents have a constitutionally-protected parental status derived from the fundamental right under the constitution to make decisions concerning the care, custody, and control of their children. The Court noted that a natural parent is presumed to act in the child's best interest and thus, the state need not be involved in determining the ability of that parent to make the best decisions concerning the rearing of that parent's children. *Id.* at 68-69, 147 L. Ed. 2d at 58. Accord *Meyer v. Nebraska*, 262 U.S. 390, 399, 67 L. Ed. 1042 (1923) ("The rights to conceive and to raise one's children have been deemed 'essential.'"). Moreover, in North Carolina, it is well settled law that the biological parent "is the natural guardian, and, as such, has the legal right to custody, care and control, is a suitable person, even though others may offer more material advantages in life for the child." *Browning v. Humphrey*, 241 N.C. 285, 287, 84 S.E.2d 917, 918 (1954).

Nonetheless, the "protection of the parent's interest is not absolute." *Price v. Howard*, 346 N.C. at 79, 484 S.E.2d at 534. With a finding that the natural parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care and control of their children may not prevail. See *Petersen v. Rogers*, 337 N.C. 397, 403, 445 S.E.2d 901, 905 (1994). Thus, a natural parent's constitutionally protected status may be lost, if a trial court determines that clear and convincing evidence

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shows that the parent's conduct is inconsistent with that protected status. *Owenby v. Young*, 150 N.C. App. 412, 563 S.E.2d 611 (2002). Indeed, if the trial court determines that a natural parent has acted inconsistent with the protected status, then the court should apply the "best interests of the child" test in resolving custody disputes between the parent and the non-parent. See *Price v. Howard*, 346 N.C. at 79, 484 S.E.2d at 534. The conduct "must have some negative impact on the child or constitute a substantial risk of such impact." *Speagle*, 354 N.C. at 531, 557 S.E.2d at 87.

In this case, the trial court concluded as a matter of law in pertinent part:

3. The Defendant is not a fit and proper person to have the care, custody and control of the minor child.
4. Having previously been found to be unfit to have the care, custody and control of the minor child, the standard for determining custody in this matter is what is in the best interest of the minor child.
5. It is in the best interest of the minor that she be placed in the primary care, custody and control of the plaintiff.

These conclusions were supported by the previously noted findings of fact which were based on evidence showing that Ms. McMillian is not able to adequately care and provide for the minor child and is not able to properly see to the needs of the child. Moreover, the earlier determination that Ms. McMillian was unfit as well as the evidence presented at the subject hearing support the conclusion that her actions were inconsistent with her protected status as a parent. Indeed, as noted earlier, the trial court did not solely rely on the determination of unfitness from the 1999 custody case but made additional findings based on present circumstances supported by competent evidence.

Moreover, the record contains evidence supporting the trial court's determination that it was in the child's best interest that she remain with Ms. Davis. For example, the child had lived with Ms. Davis nearly all of her life; Ms. Davis had developed a close relationship with the child and cared for the child handling her day-to-day care, medical appointments and support. Furthermore, the record shows that Ms. Davis has never denied Ms. McMillian access to the minor child. Since the record shows competent evidence to support

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the trial court's findings of fact, which in turn support the conclusions of law, we affirm the judgment of the trial court awarding custody to Ms. Davis.

Affirmed.

Judges McCULLOUGH and BIGGS concurred.

JANICE F. DILDY, EMPLOYEE, PLAINTIFF v. MBW INVESTMENTS, INC., EMPLOYER,
ZENITH INSURANCE COMPANY, CARRIER; DEFENDANTS

No. COA01-510

(Filed 6 August 2002)

Workers' Compensation— injury not arising from employment—employee shot at work by former boyfriend

The Industrial Commission did not err by denying plaintiff employee workers' compensation benefits based on the fact that her injury did not arise out of her employment even though she was shot at her place of employment by her former boyfriend, because: (1) an injury is not compensable when it is inflicted in an assault upon an employee by an outsider as a result of a personal relationship between them, and the attack was not created by and not reasonably related to the employment; (2) plaintiff brought this personal risk with her from her domestic and private life and the motive that inspired the assault was likely to assert itself at any time and in any place; and (3) although the conduct of the employer contributed in some degree to plaintiff being shot while performing her job duties in the store, the fact the employer failed to call the police and refused to let plaintiff leave the store did not make the risk that her former boyfriend would come back and assault plaintiff a risk arising out of the nature of the employment.

Appeal by plaintiff from Opinion and Award entered 12 January 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 March 2002.

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Ralph G. Willey, P.A., by Ralph G. Willey, III, for plaintiff-appellant.

Morris York Williams Surles & Barringer, LLP, by C. Michelle Sain, for defendant-appellees.

CAMPBELL, Judge.

Janice Dildy (“plaintiff”) appeals from an opinion and award of the North Carolina Industrial Commission (“the Commission”) denying her claim for disability benefits under the Workers’ Compensation Act (“the Act”) for injuries she received at her place of employment when she was shot by her former boyfriend. We affirm.

In June 1996, plaintiff was employed as a cashier at an Amoco gas station and convenience store in Wilson, North Carolina, owned by MBW Investments, Inc. (“defendant-employer”). Plaintiff was responsible for operating the store’s cash register, which primarily involved ringing up sales of gasoline and merchandise. The store also had a food counter which was generally manned by a different employee than the one operating the main customer counter and register.

Prior to her employment with defendant-employer, plaintiff had lived with her boyfriend, Vernon Farmer (“Farmer”). Due to the abusive nature of their relationship, plaintiff left Farmer in late 1995. Following the couple’s separation, Farmer began threatening plaintiff. In March 1996, plaintiff was seen by a psychiatrist and a therapist for depression and anxiety caused by her fear of being attacked by Farmer. Plaintiff was advised to call the police and initiate legal action. Plaintiff subsequently obtained a restraining order against Farmer, but he continued to harass and threaten her. In early May 1996, plaintiff was voluntarily admitted to the psychiatric unit of a local hospital as a result of the anxiety caused by her fear of Farmer. Finally, on 18 June 1996, plaintiff reported to her psychiatrist that Farmer had blown up her current boyfriend’s truck. Plaintiff’s psychiatrist recommended that she consider relocating.

Despite the violent nature of their relationship and the fact that Farmer continued to threaten and harass her, plaintiff did not tell her co-workers or supervisors about her relationship with Farmer.

On 21 June 1996, Farmer came into the convenience store while plaintiff was working. Plaintiff was unaware of his presence in the store until he placed a six-pack of beer on the counter. After paying

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for the beer, Farmer forcefully threw the six-pack at plaintiff, hitting her in the chest. Farmer then left the store. Plaintiff, frightened by Farmer's attack, began repeatedly exclaiming that Farmer was going to come back to the store to kill her. Plaintiff asked Ronnie Braziel ("Braziel"), the store supervisor on duty at the time, to call the police. Braziel told plaintiff to put the beer back in the beer cooler and to continue waiting on customers. As plaintiff continued working, she repeatedly asked Braziel to call the police because she was scared that Farmer would come back to the store to kill her. Braziel told plaintiff that Farmer would not be back and refused to honor plaintiff's requests to call the police.

Several minutes later, Farmer telephoned the store and plaintiff answered. Farmer threatened to come back to the store to kill plaintiff if she hung up the phone. Plaintiff reported this threat to Braziel while she was still on the phone with Farmer. Plaintiff asked Braziel to call the police or allow her to leave the store. Braziel refused plaintiff's request and told her to hang up the phone and resume waiting on customers. Approximately twenty minutes after he had first entered the store, Farmer returned with a handgun. Farmer walked up to the counter and shot at plaintiff three times, hitting her once in the right hand and once in the leg. Farmer later pled guilty to assault with a deadly weapon inflicting serious injury.

Plaintiff filed a claim for workers' compensation benefits for the injuries she received as a result of the shooting. Plaintiff's claim was denied by defendants. Prior to hearing, the parties stipulated that the provisions of the Act controlled the action, that an employer-employee relationship existed between plaintiff and defendant-employer, that defendant insurance company was the carrier, and that plaintiff had started missing time from work due to an injury sustained on or about 21 June 1996.

Plaintiff's claim was heard by a Deputy Commissioner on 10 August 1999. On 12 May 2000, the Deputy Commissioner entered an opinion and award denying plaintiff's claim. The Deputy Commissioner found that Farmer's assault on plaintiff was entirely personal to her and had nothing to do with her employment. However, the Deputy Commissioner did find that the employment contributed to the assault on plaintiff to some degree in that plaintiff's supervisor, knowing of the threats being made by Farmer, instructed plaintiff to continue working and did not call the police, thereby failing to take an opportunity to reduce the risk. Nonetheless, the Deputy Commissioner concluded that the risk of assault was not

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attributable to the employment and that plaintiff's injuries did not arise out of her employment.

Upon appeal by plaintiff, the Full Industrial Commission upheld the denial of benefits to plaintiff. Commissioner Christopher Scott filed a dissenting opinion expressing his belief that the failure of plaintiff's supervisor to call the police directly increased the already known risk of assault facing plaintiff. Plaintiff appeals, arguing that the Commission erred in concluding that the shooting did not arise out of her employment. Defendants cross-assigned error to certain findings of fact made by the Commission. Due to our resolution of plaintiff's contentions on appeal, we need not consider defendants' cross-assignments of error.

In order to be compensable under the Act, an injury must result from an accident arising out of and in the course of employment. N.C. Gen. Stat. § 97-2(6) (2001); *Hemric v. Manufacturing Co.*, 54 N.C. App. 314, 316, 283 S.E.2d 436, 438 (1981). In reviewing an opinion and award of the Industrial Commission, this Court's review is limited to a determination of whether the Commission's findings of fact are supported by any competent evidence and whether the Commission's conclusions of law are supported by such findings of fact. *Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 652, 508 S.E.2d 831, 834 (1998). However, the determination of whether an accident arises out of and in the course of employment is a mixed question of law and fact, and this Court may review the record to determine whether the findings and conclusions are supported by sufficient evidence. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977).

Within the meaning of the Act, an accident is an unlooked for and untoward event which is not expected or designed by the employee and which interrupts the employee's normal work routine and introduces unusual conditions likely to result in unexpected consequences. *Hensley v. Cooperative*, 246 N.C. 274, 278, 98 S.E.2d 289, 292 (1957). An assault may be an accident within the meaning of the Act when it is unexpected and without design on the part of the employee who suffers from it. *Gallimore*, 292 N.C. at 402, 233 S.E.2d at 531; see also *Robbins v. Nicholson*, 281 N.C. 234, 188 S.E.2d 350 (1972). The phrase "in the course of the employment" refers to the time, place and circumstances under which an accidental injury occurs. *Robbins*, 281 N.C. at 238, 188 S.E.2d at 353. In the instant case, plaintiff was shot, without design on her part, during working hours while performing her duties as an employee on the premises of the employer. Thus,

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plaintiff's injuries were the result of an injury by accident occurring during the course of employment. Accordingly, the only issue presented by this appeal is whether the shooting that injured plaintiff arose out of her employment with defendant-employer.

The phrase "arising out of the employment" refers to the origin or causal connection of the accidental injury to the employment. *See, e.g., Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E.2d 577 (1976). "[T]he controlling test of whether an injury 'arises out of' the employment is whether the injury is a natural and probable consequence of the nature of the employment." *Gallimore*, 292 N.C. at 404, 233 S.E.2d at 532-33. An injury "arises out of the employment" if a contributing proximate cause of the injury is a risk to which the employee was exposed because of the nature of the employment, and to which the employee would not have been equally exposed apart from the employment. *Roberts v. Burlington Industries*, 321 N.C. 350, 358, 364 S.E.2d 417, 423 (1988). "This risk must be such that it 'might have been contemplated by a reasonable person familiar with the whole situation as incidental to the service when he entered the employment.'" *Gallimore*, 292 N.C. at 404, 233 S.E.2d at 533 (quoting *Bartlett v. Duke University*, 284 N.C. 230, 233, 200 S.E.2d 193, 195 (1973)). "[The] causative danger must be peculiar to the work and not common to the neighborhood." *Id.* (quoting *Harden v. Furniture Co.*, 199 N.C. 733, 735, 155 S.E. 728, 730 (1930)). This test has been referred to as the "increased risk" analysis, and focuses on whether the nature of the employment creates or increases a risk to which the employee is exposed. *Roberts*, 321 N.C. at 358, 364 S.E.2d at 422. This "increased risk" analysis is different from the "positional risk" doctrine, "which holds that '[a]n injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of employment placed claimant in the position where he was killed.'" *Id.* (quoting 1 A. Larson, *The Law of Workmen's Compensation* § 6.50 (1984)). Our Supreme Court has chosen to follow and apply the "increased risk" analysis instead of relying on the more liberal "positional risk" doctrine. *Id.* (applying "increased risk" analysis in overruling a lower court decision which was based on application of the "positional risk" doctrine).

In *Robbins v. Nicholson*, 281 N.C. 234, 188 S.E.2d 350 (1972), our Supreme Court was faced with facts similar to those in the case *sub judice*. In *Robbins*, the claimants were the survivors of two deceased employees of a grocery store. The estranged husband of one of the employees entered the store and shot his wife and a co-employee.

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The shootings had their origin in the husband's alcoholism and the domestic problems between him and his wife. The husband was jealous, had accused his wife of "running around" with her co-employee, and had gone to the store and threatened to kill them. He had also threatened to kill her employer if he continued to employ her. The Court reversed the Industrial Commission's award of benefits to the claimant-survivors, concluding that the risk of assault by the estranged husband was a personal risk the wife brought to the grocery store, and not one "occasioned by, incident to, or a condition of her employment." *Id.* at 241, 188 S.E.2d at 355. The Court further held that the employer "was under no duty to discharge [the wife] merely because her husband demanded he do so and . . . retaining her as an employee did not make the risk that [her husband] would assault her or one of her fellow employees a risk arising out of the nature of the employment." *Id.* Thus, the Court held that the assaults on the decedents were not accidents arising out of their employment. *Id.* at 242, 188 S.E.2d at 356.

In *Hemric v. Manufacturing Co.*, 54 N.C. App. 314, 283 S.E.2d 436 (1981), this Court was faced with a factual situation similar to both *Robbins* and the instant case. In *Hemric*, the claimant was shot by the boyfriend of one of his co-workers. Prior to the shooting, the co-worker had talked freely with the claimant and her other co-workers about the volatile and sometimes violent nature of her relationship with her boyfriend. When the co-worker tried to end the relationship, the boyfriend began threatening her and making harassing phone calls to her during business hours. Several days before the shooting, the boyfriend placed an obscene message about the co-worker on the front door of the business. As a result, several of the employees at the business feared for their personal safety from the boyfriend.

After repeated complaints that the co-worker was not adequately performing her job, and due to growing concerns that the boyfriend of the co-worker might cause some harm, the employer decided to fire the co-worker. The claimant was asked by his supervisor to keep a record of the co-worker's working hours so that the employer could use her tardiness as justification for firing her.

The claimant arrived at work the day of the shooting at 8:05 a.m. It was the claimant's custom to arrive at the office in the morning and then go to the post office to pick up the mail for the defendant-employer. However, since the claimant was keeping track of his co-worker's working hours, he remained at his desk until the co-worker's

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arrival at 8:25 a.m. Upon the arrival of the co-worker, the boyfriend appeared from a hiding place in the office and fired three rifle shots at the co-worker, killing her. Before the boyfriend fled, he also shot the claimant four times, seriously injuring him.

The claimant in *Hemric* argued that, had it not been for his supervisor's instructions to keep a record of the co-worker's hours, the claimant would have been at the post office and not at the office at the time of the shooting. The Court affirmed the Commission's denial of benefits to the claimant, concluding that the shooting of the claimant, just like the shootings of the employees in *Robbins*,

occurred on the premises not because the victim was performing the duties of employment at the time of the assault, but merely because he was present on the premises. The serious injuries which plaintiff sustained were caused by the vicious and unreasoned criminal act of Williams, not by an accident arising out of plaintiff's employment.

Hemric, 54 N.C. App. at 318, 283 S.E.2d at 439.

Robbins and *Hemric* are authority for the principle of law "that an injury is not compensable when it is inflicted in an assault upon an employee by an outsider as the result of a personal relationship between them, and the attack was not created by and not reasonably related to the employment." *Id.* at 318, 283 S.E.2d at 438-39. "This is true even though the employee was engaged in the performance of his duties at the time, for even though the employment may have provided a convenient opportunity for the attack it was not the cause." *Robbins*, 281 N.C. at 240, 188 S.E.2d at 354. For an injury inflicted in an assault by an outsider to be compensable, "[t]he assault must have had such a connection with the employment that it can be logically found that the nature of the employment created the risk of the attack." *Hemric*, 54 N.C. App. at 318, 283 S.E.2d at 439.

In the instant case, the evidence tends to show that plaintiff and Farmer were involved in an abusive relationship. Following their breakup, Farmer began threatening to harm plaintiff. After plaintiff obtained a restraining order against him, Farmer continued to threaten and harass her. The fact that Farmer blew up plaintiff's current boyfriend's truck further illustrates the danger posed by Farmer to plaintiff and those associated with her. Thus, Farmer's assault on plaintiff at the convenience store was entirely unrelated to the nature of plaintiff's employment; it did not stem from the type of work plain-

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tiff was required to do for defendant-employer. It was a personal risk that plaintiff brought with her from her domestic and private life and the motive that inspired the assault “was likely to assert itself at any time and in any place.” *Harden v. Furniture Co.*, 199 N.C. 733, 736, 155 S.E. 728, 730 (1930).

Plaintiff argues that the case *sub judice* is distinguishable on its facts from *Robbins* and *Hemric* in that in the case before us defendant-employer, through the supervisor on duty at the store when plaintiff was shot (Braziel), had knowledge of an outside peril that immediately endangered plaintiff, had an opportunity to protect plaintiff from this outside peril, and failed to act appropriately to reduce or eliminate the risk of peril, thereby making the assault a risk incident to the employment. However, in *Hemric*, this Court stated:

Where the employee is injured in the course of employment by an outsider because of hate, jealousy, or revenge based on a personal relationship, the fact that the employer has knowledge of prior threats of death or bodily harm does not result in the injury’s arising out of the employment.

Hemric, at 318, 283 S.E.2d at 439. Under the circumstances present here, Braziel was under no duty to call the police or let plaintiff leave the store merely because a customer had thrown beer at her and she had expressed fear that the customer would return to kill her. Braziel knew nothing about the nature of plaintiff and Farmer’s relationship and had no basis for understanding and appreciating the seriousness of the threat posed by Farmer. The fact that Braziel failed to call the police and refused to let plaintiff leave the store did not make the risk that Farmer would come back and assault plaintiff a risk arising out of the nature of the employment. *See Robbins*, 281 N.C. at 241, 188 S.E.2d at 355. While we agree with the Commission that the conduct of Braziel contributed in some degree to plaintiff being shot while performing her job duties in the store, the fact that Braziel did not take plaintiff seriously when she warned that Farmer would come back to the store to kill her was not a risk arising out of the nature of plaintiff’s employment.

Plaintiff further argues that the Supreme Court’s decision in *Wilson v. Boyd & Goforth, Inc.*, 207 N.C. 344, 177 S.E. 178 (1934), compels the conclusion that the shooting of plaintiff in the instant case arose out of her employment. In *Wilson*, the plaintiff-employee was rubbing down the wall of a septic tank in the regular course of

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his employment and in the presence of his foreman. An intoxicated co-employee who worked in another department for the defendant-employer came and sat down beside the foreman who was supervising plaintiff's work. The foreman instructed the plaintiff not to use so much water on the wall of the septic tank. The co-employee then got up and went over to the plaintiff and starting cursing at him. The plaintiff said nothing in response. The co-employee then picked up a claw-hammer and hit the plaintiff on the hip. The plaintiff came down off his scaffold and the co-employee came after him. The two men threw rocks and sticks back and forth at one another. The plaintiff then resumed his work, but the co-employee kept after him. Finally, the plaintiff fell off the edge of the septic tank and broke his leg in an attempt to get away from the co-employee. The Court affirmed the Industrial Commission's conclusion that "there is a causal connection between the plaintiff's employment in this case and the injury he sustained." *Id.* at 347, 177 S.E. at 179-80.

The facts of the case *sub judice* are readily distinguishable from those in *Wilson*. In *Wilson*, the assault on the plaintiff was directly related to his employment in that the perpetrator of the assault was not a complete outsider, but rather a co-employee, and the origin of the assault lay in the perceived ineffective manner in which the plaintiff was performing his employment. Here, plaintiff was assaulted by a complete outsider to her employment, and the risk of the assault lay in the domestic problems between plaintiff and the perpetrator and not in the nature of her employment. Thus, *Wilson* is not controlling.

In sum, notwithstanding the events at the convenience store on the day of the shooting, the risk to plaintiff that her former boyfriend would shoot her was not one which a rational mind would anticipate as incident to her employment with defendant-employer. The risk that her boyfriend would carry out his previous threats against her was a hazard common to the neighborhood and not peculiar to her employment; it was independent of the relation between employer and employee.

Although "[t]he Workers' Compensation Act 'should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation,'" *Roberts v. Burlington Industries*, 321 N.C. 350, 359, 364 S.E.2d 417, 423 (1988) (quoting *Guest v. Iron & Metal Co.*, 241 N.C. 448, 452, 85 S.E.2d 596, 599 (1955)), "the rule of liberal construction cannot be employed to attribute to a provision of the Act a meaning foreign to the plain and

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unmistakable words in which it is couched.” *Id.* (quoting *Henry v. Leather Co.*, 231 N.C. 477, 480, 57 S.E.2d 760, 762-63 (1950)). “The Act was not intended to establish general insurance benefits.” *Id.* To grant compensation in the instant case would effectively remove the “arising out of the employment” requirement of the Act. *Id.* at 360, 364 S.E.2d at 424.

Accordingly, we find that the evidence was sufficient to support the Commission’s findings of fact and that these findings support the Commission’s denial of plaintiff’s claim for workers’ compensation benefits since plaintiff’s injury did not arise out of her employment.

Affirmed.

Judges GREENE and MCGEE concur.

SANDRA BUTLER, PLAINTIFF V. JEFFREY BUTLER, DEFENDANT

No. COA01-809

(Filed 6 August 2002)

1. Jurisdiction— child support—nonresident father—long-arm statute

The trial court had statutory authority under N.C.G.S. § 52C-2-201(3) and (5) to exercise personal jurisdiction over defendant nonresident father in an action for child support on grounds that “defendant resided with the child in this State” and that the minor child “resides in this State as a result of the acts or directives of” the father where the trial court found on the basis of competent evidence that the father purchased a house in North Carolina partially to allow his daughter to attend school in this State, and that, while still married to plaintiff mother, defendant visited plaintiff and his daughter in this State at least once per month for at least two years and resided in the marital residence for three or more days at a time.

2. Jurisdiction— personal—domestic action—spouse and children in North Carolina—minimum contacts

Defendant’s right to due process was not violated by the state’s exercise of personal jurisdiction over him in a domestic

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action where the parties lived in the Bahamas for the first years of their marriage; plaintiff and her two daughters moved to a house in North Carolina purchased by plaintiff and defendant; defendant testified that he was convinced that North Carolina was the best place to educate the girls; defendant visited at least once a month for two years during the marriage, staying in the house for three or more days at a time; defendant maintained a membership in a social and sporting association in Moore County; and defendant used the equity in the house for business purposes.

Appeal by defendant from order entered 2 January 2001 by Judge Lee W. Gavin in Moore County District Court. Heard in the Court of Appeals 27 March 2002.

The Rosen Law Firm, by Lee S. Rosen and Erik L. Mazzone, for plaintiff-appellee.

Staton, Perkinson, Doster, Post, and Silverman, P.A., by Jonathan Silverman and Charles M. Oldham, III, for defendant-appellant.

CAMPBELL, Judge.

Jeffrey Butler (“defendant”) appeals from the trial court’s order denying his motion to dismiss plaintiff’s action pursuant to N.C. R. Civ. P. 12(b)(2) based on lack of personal jurisdiction. We hold that the trial court correctly concluded that sufficient grounds exist for the courts of this State to exercise personal jurisdiction over defendant in the instant action. Accordingly, we affirm the trial court’s ruling.

Jeffrey and Sandra Butler (“plaintiff”) were married in Florida on 19 October 1992. The parties have a daughter, Shannon Butler, who was born on 12 November 1991 and lived with the parties in the Bahamas during the first four or five years of their marriage.¹ In 1995 or 1996, plaintiff and her two daughters moved to Florida, then on to North Carolina, where they took up residence in a house in Moore County purchased by plaintiff and defendant.

Plaintiff and defendant separated on 1 July 2000, and on 18 September 2000, plaintiff instituted the instant action, seeking child

1. Plaintiff also has a daughter from a previous marriage who lived with plaintiff and defendant in the Bahamas following their marriage.

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support, alimony, postseparation support, and equitable distribution. The complaint alleges that “[d]efendant is a citizen and resident of Freeport, Grand Bahama Island.” Defendant was served with the summons and complaint in Florida on 27 September 2000. On 16 October 2000, defendant filed a motion to dismiss plaintiff’s complaint under N.C. R. Civ. P. 12(b)(2), asserting that the court lacked personal jurisdiction over him “in that he has at no time been a resident of the State of North Carolina.” After hearing the testimony of plaintiff and defendant, the trial court concluded that defendant had sufficient minimum contacts with this State to allow the court to constitutionally assert personal jurisdiction over him under this State’s long-arm statutes, including, but not limited to, N.C. Gen. Stat. § 52C-2-201. Accordingly, the trial court denied defendant’s motion to dismiss. Defendant appeals.

The denial of a motion to dismiss for lack of personal jurisdiction, although interlocutory, is immediately appealable. N.C. Gen. Stat. § 1-277(b) (2001); *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982); *Cooper v. Shealy*, 140 N.C. App. 729, 537 S.E.2d 854 (2000). In reviewing an order determining whether personal jurisdiction is statutorily and constitutionally permissible, “[t]he trial court’s findings of fact are conclusive if supported by any competent evidence and judgment supported by such findings will be affirmed, even though there may be evidence to the contrary.” *Shamley v. Shamley*, 117 N.C. App. 175, 180, 455 S.E.2d 435, 438 (1994) (citing *Little v. Little*, 9 N.C. App. 361, 365, 176 S.E.2d 521, 523-24 (1970)).

It is well settled “that a two-step analysis is to be employed to determine whether a non-resident defendant is subject to the *in personam* jurisdiction of our courts.” *Miller v. Kite*, 313 N.C. 474, 476, 329 S.E.2d 663, 665 (1985). First, it should be determined whether North Carolina law provides a statutory basis for the assertion of personal jurisdiction in the action the plaintiff has brought against the defendant. *Id.*; see also *Sherlock v. Sherlock*, 143 N.C. App. 300, 301, 545 S.E.2d 757, 759 (2001); *Shamley*, 117 N.C. App. at 178, 435 S.E.2d at 437. If the court concludes that there is a statutory basis for jurisdiction, it must determine whether the exercise of personal jurisdiction comports with the due process requirements of the Fourteenth Amendment. *Miller*, 313 N.C. at 476, 329 S.E.2d at 665.

The trial court entered the following findings of fact in support of its conclusion that personal jurisdiction over defendant was statutorily and constitutionally permissible in the instant case:

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- a. Prior to the institution of these lawsuits, Defendant purchased a house in Moore County with the Plaintiff partially to allow his daughter to be schooled in North Carolina, therefore availing himself of the Moore County Schools and other associated benefits provided by the state.
- b. While married to the Plaintiff and after the parties had purchased their residence in Moore County, the Defendant visited Moore County at least once per month for at least two years. During these visits he would reside in the marital residence for three (or more) day periods.
- c. Defendant maintains a membership in Moore County [H]ounds, a social and sporting association and has participated in its activities in Moore County.
- d. Defendant has used the equity line attached to the marital residence in Moore County for business purposes.

These findings of fact are supported by the testimony of the parties, which was the only evidence received by the trial court.

Defendant testified that the parties purchased the house in Moore County in 1995 and that his name appears on the deed and on the mortgage to the house. Defendant also testified that he “was convinced that North Carolina was the best place for education for the girls.” However, later in his testimony, defendant stated that he took no part in plaintiff’s decision to take the girls to North Carolina, but that he agreed to purchase the house and let the girls stay in school here instead of fighting the issue in the Supreme Court of the Bahamas, which was the girls’ legal residence. According to defendant’s testimony, he moved plaintiff and the girls to Florida in 1995. Two months later, without his knowledge, plaintiff moved with the girls to North Carolina. Defendant testified that he visited plaintiff and the girls an average of once per month following their move to North Carolina. Defendant also testified that he and plaintiff had taken out an equity line of credit on the house in Moore County.

Plaintiff testified that she and defendant purchased the house in North Carolina in 1995 with the intention of moving the following year, and that defendant made preparations to sell his business in the Bahamas in anticipation of the family’s move to this State. According to plaintiff, defendant visited her and the girls every two weeks following their move to Moore County. She further testified that defendant used the equity line of credit on the Moore County house

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to obtain cash to purchase supplies to take back to the Bahamas for business purposes.² Although the testimony of the parties conflicts as to certain details of the course of events, there is competent evidence in the record to support the findings of fact entered by the trial court. Thus, we must determine whether these findings support the exercise of personal jurisdiction over defendant. *See Shamley*, 117 N.C. App. at 180, 455 S.E.2d at 438.

The trial court found statutory grounds for personal jurisdiction under the Uniform Interstate Family Support Act ("UIFSA"), codified in Chapter 52C of the North Carolina General Statutes. *See* N.C. Gen. Stat. § 52C-1-100 to -9-902 (2001).³ We agree.

UIFSA provides procedural mechanisms for the interstate establishment, enforcement and modification of child and spousal support obligations. N.C.G.S. § 52C-1-103 official commentary; *Welsher v. Rager*, 127 N.C. App. 521, 524, 491 S.E.2d 661, 663 (1997). UIFSA was enacted to replace its predecessor, the Uniform Reciprocal Enforcement of Support Act ("URES"). Under URES, a state could assert jurisdiction to establish, vacate, or modify a child or spousal support obligation even when a similar obligation had been created in another jurisdiction. *Welsher*, 127 N.C. App. at 524, 491 S.E.2d at 663. "The result was often multiple, inconsistent obligations existing for the same obligor and injustice in that obligors could avoid their responsibility by moving to another jurisdiction and having their support obligations modified or even vacated." *Id.* UIFSA creates a structure designed to correct this problem and provide for only one support order at a time. N.C.G.S. § 52C-2-201 official commentary.

UIFSA provides two options for a petitioner seeking to establish a child or spousal support order against a respondent residing in another state. First, the petitioner may initiate a two-state proceeding to establish a support order in the respondent's State of residence. N.C.G.S. § 52C-3-301(c); N.C.G.S. § 52C-2-203 to -2-206. This two-state procedure is derived from the two-state procedure under URES. N.C.G.S. § 52C-3-301 official commentary. In this situation, the initiating State does not assert personal jurisdiction over the nonresident respondent, but instead forwards the case to the responding State (the respondent's State of residence), which has the authority to

2. Defendant admitted that he used the equity line of credit to obtain cash but claimed that it was not for business purposes.

3. Contrary to defendant's contention, the court below did not expressly base personal jurisdiction on N.C. Gen. Stat. § 1-75.4(12).

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assert personal jurisdiction over its resident. N.C.G.S. § 52C-2-203 official commentary.

The second option is for the petitioner to utilize UIFSA's long-arm statute to obtain personal jurisdiction over the nonresident respondent. N.C.G.S. § 52C-2-201. The petitioner may then file a petition or comparable pleading directly in the State which has or can obtain personal jurisdiction over the respondent. N.C.G.S. § 52C-3-301(c).⁴ The purpose of UIFSA's long-arm statute is to reduce the frequency of the two-state procedure. N.C.G.S. § 52C-2-201 official commentary. In a one-state proceeding under the long-arm statute, the forum State may utilize certain two-state procedures which forward the interests of economy, efficiency, and fair play. N.C.G.S. § 52C-2-202 official commentary. Thus, under N.C.G.S. § 52C-2-202, when a court of this State exercises personal jurisdiction over a nonresident under N.C.G.S. § 52C-2-201, it "may apply G.S. 52C-3-315 to receive evidence from another state, and G.S. 52C-3-317 to obtain discovery through a tribunal of another state." N.C.G.S. § 52C-2-202.

[1] In the instant case, plaintiff initiated a one-state action in this State for child support, spousal support and equitable distribution, and the trial court found statutory authority for the exercise of personal jurisdiction under N.C.G.S. § 52C-2-201.

N.C.G.S. § 52C-2-201 allows a tribunal of this State to exercise personal jurisdiction over a nonresident individual in a proceeding to establish a child or spousal support order in the following instances applicable to the instant case:

(3) The individual resided with the child in this State;

...

(5) The child resides in this State as a result of the acts or directives of the individual;

...

(8) There is any other basis consistent with the constitutions of this State and the United States for the exercise of personal jurisdiction.

4. Of course, a third option is always available that does not implicate UIFSA. A petitioner may simply file a suit in the respondent's State of residence (perhaps to settle all issues between the parties in a single proceeding). See N.C.G.S. § 52C-2-201 official commentary.

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N.C.G.S. § 52C-2-201. When personal jurisdiction is alleged to exist pursuant to subsection (8) of N.C.G.S. § 52C-2-201, the question of statutory authority to exercise personal jurisdiction collapses into the question of whether such exercise of personal jurisdiction meets the due process requirements of the Fourteenth Amendment.

According to the official commentary to N.C.G.S. § 52C-2-201, subsection (8) permits the assertion of long-arm jurisdiction over a nonresident, such as defendant in the instant case, in an action for spousal support. Further, the official commentary states that the assertion of personal jurisdiction under subsection (8) yields jurisdiction over all matters to be decided between the spouses, including the division of property on divorce. N.C.G.S. § 52C-2-201 official commentary.

Applying UIFSA's long-arm statute to the trial court's findings of fact in the instant case, we conclude that statutory personal jurisdiction exists as to plaintiff's child support claim pursuant to subsections (3) and (5) of N.C.G.S. § 52C-2-201. The trial court found as fact based on competent evidence that defendant purchased the house in North Carolina partially to allow his daughter to attend school in this State. This finding of fact supports the legal conclusion that defendant's minor child "resides in this State as a result of the acts or directives of the individual." N.C.G.S. § 52C-2-201(5). The trial court further found as fact that, while still married to plaintiff, defendant visited plaintiff and his daughter in Moore County at least once per month for at least two years and resided in the marital residence for three or more days at a time. These factual findings support the conclusion that defendant "resided with the child in this State." N.C.G.S. § 52C-2-201(3). For these reasons, we conclude that statutory jurisdiction over plaintiff's child support claim exists under UIFSA.⁵

[2] However, in order to assert statutory personal jurisdiction over defendant as to plaintiff's claims for spousal support and equitable distribution, we must rely on subsection (8) of N.C.G.S. § 52C-2-201. Accordingly, if the exercise of personal jurisdiction over defendant complies with constitutional due process standards, the courts of this State are free to exercise such jurisdiction as to all of the claims asserted by plaintiff in the case *sub judice*, and the order of the trial court must be affirmed.

5. A determination that statutory jurisdiction exists pursuant to UIFSA is likewise a determination that statutory jurisdiction exists pursuant to N.C. Gen. Stat. § 1-75.4(2) (2001), which confers personal jurisdiction whenever any special personal jurisdiction statute applies.

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The constitutional due process requirements for personal jurisdiction were articulated by the United State Supreme Court in *International Shoe Company v. Washington*, 326 U.S. 310, 90 L. Ed. 95 (1945), in which the Court held:

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'

Id. at 316, 90 L. Ed. at 102 (citation omitted). The concept of "minimum contacts" furthers the following two goals: (1) "it safeguards the defendant from being required to defend an action in a distant or inconvenient forum," and (2) "it prevents a state from escaping the restraints imposed upon it by its status as a coequal sovereign in a federal system." *Miller*, 313 N.C. at 477, 329 S.E.2d at 665 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L. Ed. 2d 490 (1980)).

In *Hanson v. Denckla*, 357 U.S. 235, 2 L. Ed. 2d 1283 (1958), the United States Supreme Court held that the unilateral activity of those claiming a relationship with a nonresident defendant may not, without more, satisfy due process requirements. Rather,

[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Id. at 253, 2 L. Ed. 2d at 1298. "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 542 (1985). However, personal jurisdiction is constitutionally permissible "where the contacts proximately result from actions by the defendant himself[.]" *Id.*

The factors to be considered in determining whether constitutionally sufficient minimum contacts exist include:

(1) the quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience of the parties.

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Filmar Racing Inc. v. Stewart, 141 N.C. App. 668, 672, 541 S.E.2d 733, 737 (2001). The United States Supreme Court has also indicated that a factor to be considered is whether the relationship between the defendant and the forum state is such that the defendant "should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980).

In the instant case, the house in Moore County was purchased jointly by plaintiff and defendant. Defendant's name appears on both the deed and the home mortgage. Defendant testified that he was convinced that North Carolina was the best place for his daughter and stepdaughter to receive an education. Based on this competent evidence, the trial court found as fact that one reason defendant purchased the house in North Carolina was to allow his daughter to be schooled here. Following their move to North Carolina, defendant visited plaintiff and the girls at least once a month for two years, staying in the house for three or more days at a time. During this period, plaintiff and defendant were still married. Thus, we agree with the trial court's characterization of the house in Moore County as a "marital residence." In addition to visiting his family in this State, defendant maintained a membership in Moore County Hounds, a social and sporting association, and participated in the association's activities in Moore County. Finally, the evidence shows that defendant further benefitted from his connections with this State by using the equity line of credit on the Moore County house for business purposes.

These facts support the conclusion that defendant's contact with this State is the proximate result of his own actions and not the unilateral activity of plaintiff moving to North Carolina with defendant's daughter. In addition, defendant's contacts with this State are sufficiently related to the instant action (both defendant's contacts and the instant action arise out of the family relationship shared by defendant, plaintiff and the parties' daughter) to support the conclusion that defendant should have reasonably anticipated being subjected to suit in this State in relation to those contacts. We further find that North Carolina has an important interest in the resolution of plaintiff's claims in the instant action, since plaintiff and the parties' daughter currently reside in this State. Finally, in light of the nature of his contacts with this State, defendant has failed to show how the exercise of personal jurisdiction over him would be so unfair and inconvenient as to rise to the level of a due process violation.

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Defendant relies on our Supreme Court's decision in *Miller* to support his contention that he does not possess sufficient minimum contacts with this State to permit the exercise of personal jurisdiction over him. In *Miller*, the evidence showed that the nonresident defendant married the plaintiff in Illinois in 1967 and the parties' daughter was born in Illinois in 1968. Following the parties' separation in 1971, the plaintiff took custody of the daughter, and in late 1972 or early 1973 the plaintiff and daughter moved to North Carolina. In January 1973, the defendant began mailing child support payments to this State, and between 1973 and 1981, the defendant visited his daughter in North Carolina approximately six times. The defendant in *Miller* never lived in North Carolina or purchased property here. Based on these facts, the Court concluded that the daughter's presence in this State was solely the result of the plaintiff's decision as the custodial parent to live here with the child. *Miller*, 313 N.C. at 479, 329 S.E.2d at 666. The Court further concluded that the defendant had not purposefully availed himself of the benefits and protections of the laws of this State and held that the exercise of personal jurisdiction over the defendant would violate due process. *Id.*

Defendant's reliance on *Miller* is misplaced. The quality and nature of defendant's contacts with North Carolina in the instant case far exceed those of the nonresident defendant in *Miller*. Defendant purchased property in this State in order to allow his daughter to benefit from the education provided by this State's public school system, whereas the defendant in *Miller* never purchased any property here. Further, defendant's visits to this State following the purchase of the house in Moore County occurred while he and plaintiff were still married and the two of them held joint custody of their daughter. In *Miller*, the defendant's visits to this State occurred after the parties had separated, the plaintiff had assumed custody of the parties' minor child, and the plaintiff had moved the minor child to North Carolina. For these reasons, we distinguish the instant case from *Miller*.

In sum, we conclude that the record supports the conclusion that defendant purposefully availed himself of the benefits and protections of this State's laws. Defendant's contacts with North Carolina clearly exceed the "minimum contacts" required for the exercise of personal jurisdiction such that he should have reasonably been expected to be haled into court in this State. Thus, defendant's right to due process is not violated by this State's exercise of personal jurisdiction over him for purposes of plaintiff's action in the instant case.

STATE v. KINLOCK

[152 N.C. App. 84 (2002)]

For the reasons stated herein, we affirm the trial court's denial of defendant's motion to dismiss.

Affirmed.

Judges WALKER and McGEE concur.

STATE OF NORTH CAROLINA v. DARLON DILLON KINLOCK

No. COA01-950

(Filed 6 August 2002)

1. Constitutional Law—right to counsel—waiver

There was no error in a prosecution for driving while impaired and other offenses where defendant contested his waiver of his right to counsel but the judge's certification of defendant's signed waiver of counsel attested that defendant had been informed of all the statutory requirements and defendant never indicated a desire to be represented by counsel.

2. Criminal Law—instructions—limiting instruction on prior offenses not given—no plain error

There was no plain error in a prosecution for driving while impaired and other offenses where the court did not give an instruction limiting consideration of prior offenses, but defendant did not request the instruction and the evidence against defendant was overwhelming.

Judge BIGGS dissenting.

Appeal by defendant from judgment entered 23 January 2001 by Judge Jerry Braswell in Sampson County Superior Court. Heard in the Court of Appeals 10 June 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Isaac T. Avery, III, and Assistant Attorney General Patricia A. Duffy, for the State.

Christopher Wyatt Livingston for defendant-appellant.

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[152 N.C. App. 84 (2002)]

EAGLES, Chief Judge.

On 13 August 2000 at approximately 11:30 p.m., Officer Wayne D. Burley of the Roseboro Police Department was on routine patrol when he witnessed a maroon Oldsmobile make a right turn onto Claude's Drag Road without stopping for the stop sign. Officer Burley called in the license plate and discovered that the Oldsmobile was registered to defendant, Darlon Dillon Kinlock.

Officer Burley turned on his blue lights and siren and attempted to initiate a traffic stop. Instead of stopping, defendant turned off the car's headlights, accelerated to approximately 110 miles per hour, and passed two other cars in a no-passing zone. After being chased for one and one-half miles, defendant stopped in the driveway of 2072 Claude's Drag Road. Officer Burley stopped his patrol car five to ten feet behind the Oldsmobile. He got out of his patrol car while the blue lights and "takedown lights" remained on. Officer Burley walked toward defendant who was getting out of the driver's side of the Oldsmobile. Officer Burley ordered defendant to "come here for a second." Defendant replied that he "didn't have time for this now." As Officer Burley reached out to forcibly arrest defendant, defendant jumped over the hood of the Oldsmobile and began running toward the backyard of 2072 Claude's Drag Road. Officer Burley radioed that he was pursuing defendant on foot, gave a description of defendant's clothing, and communicated the direction in which defendant was running. Officer Burley followed defendant to the back of the residence at 2072 Claude's Drag Road, which was overgrown with vegetation and brush. He was unable to locate defendant.

After unsuccessfully searching for defendant, Officer Burley went back to his patrol car to await a wrecker. At his patrol car, he encountered Sampson County Sheriff's Deputy Edward Stephens and another deputy. Deputy Stephens told Officer Burley that there was a large crowd gathered down the road at the Melvin residence and that defendant may have gone there. As Deputy Stephens approached the Melvin residence, he saw a vehicle begin to drive away. Deputy Stephens followed the vehicle to Roseboro, where it turned on Lennon Street and parked in a driveway. Deputy Stephens walked up to the car, shined his flashlight into the backseat, and saw defendant slumped down on the right side behind the front passenger seat.

Deputy Stephens opened the door to talk to defendant and noticed that defendant had grass and vegetation in his hair, that defendant's eyes were glassy, and that there was a strong odor of

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alcohol coming from inside the car. Deputy Stephens radioed to Officer Burley and informed Officer Burley that defendant had been apprehended. Officer Burley arrived at the scene and arrested defendant. Officer Burley then transported defendant to the intoxilyzer room in Clinton.

When Officer Burley arrived with defendant at approximately 12:30 a.m., Trooper Shannon Smith of the North Carolina Highway Patrol began processing defendant on a DWI charge. Trooper Smith read defendant his intoxilyzer rights at 12:44 a.m. After waiting the fifteen minute observation period, at 1:02 a.m., Trooper Smith asked defendant to submit to the intoxilyzer test. Defendant refused. Trooper Smith then had defendant perform the standard psychophysical tests—one-leg stand, walk-and-turn, sway, and finger-to-nose. After witnessing defendant's poor performance on all of these tests, Trooper Smith formed the opinion that defendant had consumed a sufficient amount of an impairing substance to appreciably impair defendant's mental and/or physical faculties. Based on these observations and Officer Burley's account of the events of the evening, Trooper Smith charged defendant with driving while impaired, driving while license revoked, reckless driving, and felony speeding to elude.

On 14 August 2000, a Sampson County grand jury indicted defendant for: (1) felony speeding to elude arrest in violation of N.C.G.S. § 20-141.5; (2) driving while impaired in violation of N.C.G.S. § 20-138.1; (3) driving while license revoked in violation of N.C.G.S. § 20-28; (4) careless and reckless driving in violation of N.C.G.S. § 20-140; (5) resisting, delaying, or obstructing an officer in violation of N.C.G.S. § 14-223; and, (6) habitual felon in violation of N.C.G.S. § 14-27.4(a)(1). On 11 December 2000, defendant signed a waiver of counsel form and the Honorable James E. Ragan entered an order releasing court appointed counsel after a hearing in open court.

Defendant's case was called for trial on 22 January 2001 before the Honorable Jerry Braswell in the Criminal Session of Superior Court in Clinton, Sampson County, North Carolina. At trial, Judge Braswell questioned defendant about his decision to proceed pro se:

THE COURT: Okay, Mr. Kinlock, your case is the first case for trial today. The calendar indicates that you have waived your right to a court appointed attorney. Is that right, sir?

DEFENDANT: Yes, sir.

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THE COURT: Okay. And the waiver is in the file. Do you have any questions to the Court prior to proceeding with the trial of your case, sir?

In response to this question, defendant indicated that he was willing to discuss a plea bargain. The trial court assured defendant that he would be given the chance to discuss a plea bargain with the prosecutor. In addition, the trial court explained defendant's constitutional rights to trial by jury. Assistant District Attorney Greg Butler then addressed the trial court and requested the court to further inquire about defendant's pro se appearance:

THE COURT: Mr. Kinlock, it appears as I have indicated to you before that you have waived your right to a court appointed attorney.

DEFENDANT: Yes, sir.

THE COURT: As you know, you have the right to hire your own lawyer. You have appeared in court this morning and it does not appear that a lawyer is with you. Have you hired a lawyer to represent you?

DEFENDANT: No, sir. At that time, I was going to try to hire Doug Parsons. But he said he's got so much in the courts he couldn't take my case and by the time I got around to another lawyer, it was too late.

THE COURT: You have not hired a lawyer?

DEFENDANT: No, sir. I have not hired a lawyer; couldn't get to hire no one at that time.

THE COURT: Very well. I understand. Okay.

MR. BUTLER: Thank you, Your Honor.

After hearing the evidence, a jury found defendant guilty on all charges. Judge Braswell sentenced defendant to substantial terms of imprisonment and entered judgment. Defendant appeals.

On appeal, defendant contends: (1) the trial court erred by not conducting a more extensive *Faretta* inquiry to determine the voluntary and well-informed character of defendant's waiver of counsel and (2) the trial court fundamentally erred by not giving a limiting instruction that defendant's prior convictions were to be considered only for credibility purposes.

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I.

[1] Defendant first contends that Judge Braswell's inquiry regarding defendant's waiver of right to counsel was insufficient under the Sixth Amendment of the United States Constitution and failed to conform with the requirements of N.C.G.S. § 15A-1242. On 11 December 2000, defendant signed and Judge James E. Ragan certified a waiver of counsel. Despite this written waiver, defendant argues that N.C.G.S. § 15A-1242 required Judge Braswell, the judge who presided over defendant's trial, to conduct an inquiry into defendant's decision to represent himself.

The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." N.C.G.S. § 15A-1242 provides:

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

- (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- (2) Understands and appreciates the consequences of this decision; and
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

In *State v. Hyatt*, 132 N.C. App. 697, 700, 513 S.E.2d 90, 93 (1999), this Court noted:

Once given, a waiver of counsel is good and sufficient until the proceedings are terminated or until the defendant makes known to the court that he desires to withdraw the waiver and have counsel assigned to him. *State v. Watson*, 21 N.C. App. 374, 379, 204 S.E.2d 537, 540-41, *cert. denied*, 285 N.C. 595, 206 S.E.2d 866 (1974). Indeed, "[t]he burden of showing the change in the desire of the defendant for counsel rests upon the defendant." *Id.*

In *State v. Lamb*, 103 N.C. App. 646, 406 S.E.2d 654 (1991), this Court held that a pre-trial proceeding conducted by a judge different from the judge who presided over the trial satisfied the statutory requirement. The Court explained:

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Defendant argues, however, that Judge Walker's inquiry did not satisfy N.C.G.S. § 15A-1242 because this statute required Judge Allen, as the judge presiding at defendant's trial, to make the inquiry. Although N.C.G.S. § 15A-1242 states that the "trial judge" must make the inquiry into defendant's choice to represent himself, we do not read the statute as mandating that the inquiry be made by the judge actually presiding at the defendant's trial. A thorough inquiry into the three substantive elements of the statute, conducted at a preliminary stage of a proceeding, meets the requirements of N.C.G.S. § 15A-1242 even if it is conducted by a judge other than the judge who presides at the subsequent trial. *See State v. Kuplen*, 316 N.C. 387, 343 S.E.2d 793 (1986) (where judge conducted inquiry at preliminary hearing on motion to withdraw, statutory requirements of N.C.G.S. § 15A-1242 were satisfied even though different judge presided at trial); *State v. Messick*, 88 N.C. App. 428, 363 S.E.2d 657, *cert. denied*, 323 N.C. 368, 373 S.E.2d 553 (1988) (where an inquiry under N.C.G.S. § 15A-1242 was made by one judge at pretrial hearing, a de novo inquiry was not required by second judge who presided at actual trial). In this case, Judge Walker conducted an inquiry at the pre-trial proceeding, which covered the three substantive elements in N.C.G.S. § 15A-1242. The fact that Judge Walker did not later preside over defendant's actual trial does not invalidate compliance with the statute. The statute was fully complied with, and it was therefore unnecessary for Judge Allen to repeat the statutory inquiry.

Lamb, 103 N.C. App. at 648-49, 406 S.E.2d at 655-56.

Here, defendant signed a waiver of counsel and that waiver was certified by Judge James E. Ragan after a pre-trial proceeding on 11 December 2000. Although there is no transcript of the waiver proceeding, "[t]here is a presumption of regularity accorded the official acts of public officers." *State v. Kornegay*, 313 N.C. 1, 19, 326 S.E.2d 881, 895 (1985). In North Carolina the burden is on the appellant to show error and to show that the error was prejudicial. *State v. Murphy*, 100 N.C. App. 33, 41, 394 S.E.2d 300, 305 (1990). "An appellate court is not required to, and should not, assume error by the trial [court] when none appears on the record before the appellate court." *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968). "When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record

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indicates otherwise.” *State v. Warren*, 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986).

Defendant’s contention that N.C.G.S. § 15A-1242 required Judge Braswell, the judge who presided over defendant’s trial, to conduct an inquiry into defendant’s decision to represent himself is not supported by prevailing case law. Judge Ragan’s certification of defendant’s signed waiver of counsel attested that defendant had been informed of all the requirements set forth in N.C.G.S. § 15A-1242. At trial before Judge Braswell, defendant never indicated a desire to be represented by counsel. *See Watson*, 21 N.C. App. at 379, 204 S.E.2d at 540-41. After careful consideration of the record and briefs, we hold that defendant’s waiver of counsel was in accordance with the requirements set forth in N.C.G.S. § 15A-1242 and consistent with defendant’s Sixth Amendment rights. Accordingly, this assignment of error fails.

II.

[2] As his last assignment of error, defendant contends that the trial court committed plain error by not instructing the jury that evidence of defendant’s prior criminal convictions could be considered only for the purpose of judging defendant’s credibility. Here, defendant failed to request a limiting instruction. Despite this failure, defendant argues that the trial court had a duty, *ex mero motu*, to give a limiting instruction advising the jury that the evidence of prior offenses committed by defendant was offered only for the purpose of attacking defendant’s credibility.

In *State v. Gardner*, this Court held:

A limiting instruction is required only when evidence of a prior conviction is elicited on cross-examination of a defendant and the defendant requests the instruction. In addition, evidence regarding prior convictions of a defendant is merely a subordinate feature of the case and, absent a request, the court is not required to give limiting instructions.

68 N.C. App. 515, 522, 316 S.E.2d 131, 134 (1984) (citations omitted).

“The plain error doctrine applies only in truly exceptional cases, placing a much heavier burden on the defendant than the burden imposed by N.C.G.S. § 15A-1443, which applies to defendants who have preserved their rights by timely objection.” *State v. Allen*, 141

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N.C. App. 610, 617, 541 S.E.2d 490, 495 (2000). To prevail under the plain error doctrine, a defendant must convince this Court, “with support from the record, that the claimed error is so fundamental, so basic, so prejudicial, or so lacking in its elements that absent the error the jury probably would have reached a different verdict.” *Id.*, 541 S.E.2d at 496.

Here, defendant failed to request a limiting instruction. Even if the trial court’s failure to give the limiting instruction was error, the error was harmless. On this record, defendant cannot show that absent the alleged error a different result would have probably been reached by the jury. The eyewitness testimony provided by Officer Burley, Deputy Stephens, and Trooper Smith in support of the charges against defendant was overwhelming. Accordingly, we hold that this assignment of error fails.

For the foregoing reasons, we conclude that defendant’s trial was free from error.

No error.

Judge WALKER concurs.

Judge BIGGS dissents.

BIGGS, Judge, dissenting.

I respectfully disagree with the majority’s determination that the trial court, on the facts of this case, was not required to conduct a more extensive inquiry before allowing defendant to proceed *pro se*.

It is well settled that a defendant has a constitutional right to waive counsel and proceed *pro se*. See *Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562 (1975). However, our Supreme Court has held that before allowing a defendant to waive in-court representation, the following constitutional and statutory standards must be met: (1) a defendant must “clearly and unequivocally” express a desire to waive his right to counsel and proceed *pro se*; and (2) the trial court must satisfy itself that the defendant’s waiver was made “knowingly, intelligently, and voluntarily.” *State v. Carter*, 338 N.C. 569, 581, 451 S.E.2d 157, 163 (1994), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995). Neither of these requirements has been satisfied in the case *sub judice*.

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As the majority correctly points out, defendant signed a waiver of counsel form on 11 December 2000. Though the waiver form explicitly instructs that the defendant check only one of two boxes to indicate (1) his desire to waive assigned counsel or; (2) his desire to waive all counsel and appear on his own behalf, the defendant checked both boxes. It is unclear from the face of the form whether defendant elected to proceed without assigned counsel or whether defendant wished to proceed without any counsel and represent himself. At the very least this would suggest some level of confusion by the defendant.

Moreover, while the majority repeatedly states that the trial judge certified the waiver, an examination of the waiver indicates otherwise. Though the presiding judge signed the waiver, he failed to check either box in the certification section of the form indicating whether defendant elected to proceed without assigned counsel or whether defendant wished to proceed without all assistance of counsel. The form instructs the judge to check one of the two boxes. “[The] trial court ha[s] an affirmative obligation to be aware of and comply with all the provisions contained in the [AOC] forms.” *Tevepaugh v. Tevepaugh*, 135 N.C. App. 489, 493 n. 4, 521 S.E.2d 117, 121 (1999). Thus, the waiver form cannot be accorded the “presumption of regularity” asserted by the majority.

In addition, an examination of the record clearly indicates that the defendant signed the waiver of counsel form *intending* to retain counsel and not intending to proceed *pro se*. When asked about his waiver by the trial court, the defendant stated that when he executed the waiver, “[a]t that time, I was going to try to hire [a lawyer]. . . but . . . he couldn’t take my case and by the time I got around to another lawyer, it was too late.” The court made no further inquiry and proceeded to trial. The court never inquired whether defendant wanted to represent himself, nor did he ever indicate he wanted to proceed *pro se*. “Statements of a desire not to be represented by court appointed counsel do not amount to expressions of an intention to represent oneself.” *State v. Hutchins*, 303 N.C. 321, 339, 279 S.E.2d 788, 800 (1981).

Due to the irregularities in the waiver, we are unable to conclude that defendant clearly and unequivocally elected to proceed *pro se* as is constitutionally required. “Given the fundamental nature of the right to counsel, we ought not to indulge in the presumption that it has been waived by anything less than an express indication of such an intention.” *Id.* Therefore, it was error to allow defendant to pro-

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ceed *pro se* absent an express desire to do so, and thus, he is entitled to a new trial. See *State v. McCrowre*, 312 N.C. 478, 322 S.E.2d 775 (1984) (error to allow defendant who had signed waiver of assigned counsel to proceed *pro se* where defendant gave no indication of wishing to represent himself).

Assuming *arguendo* that there had been a clear expression of intent to proceed *pro se*, defendant is nevertheless entitled to a new trial due to the court's failure to conduct the inquiry required by N.C.G.S. § 15A-1242 (2001). Again, due to the irregularities of the waiver, the majority's reliance on the proposition that "[w]hen a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates otherwise[.]" is misplaced. Absent this presumption and the lack of transcription of the hearing in which the waiver was signed, the record fails to evidence that the requirements of N.C.G.S. § 15-1242 have been met. This Court has long held that "[t]he record must affirmatively show that the [N.C.G.S. § 15A-1242] inquiry was made and that the defendant, by his answers," voluntarily and with understanding of consequences, waived his right to counsel and elected to represent himself. *State v. Callahan*, 83 N.C. App. 323, 324, 350 S.E.2d 128, 129 (1986), *disc. review denied*, 319 N.C. 225, 353 S.E.2d 409 (1987). Moreover, the trial court's inquiry must be thorough and "perfunctory questioning is not sufficient." *State v. Thomas*, 331 N.C. 671, 674-75, 417 S.E.2d 473, 476 (1992) (citation omitted). Thus the examination of defendant by Judge Braswell before proceeding to trial does not satisfy the requirements of N.C.G.S. § 15A-1242:

THE COURT: Mr. Kinlock, it appears as I have indicated to you before that you waived your right to a court appointed attorney.

DEFENDANT: Yes, sir.

THE COURT: As you know, you have the right to hire your own lawyer. You have appeared in court this morning and it does not appear that a lawyer is with you. Have you hired a lawyer to represent you?

DEFENDANT: No, sir. At that time, I was going to try to hire Doug Parsons. But he said he's got so much in the courts he couldn't take my case and by the time I got around to another lawyer, it was too late.

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THE COURT: You have not hired a lawyer?

DEFENDANT: No, sir. I have not hired a lawyer; couldn't get to hire no one at that time.

THE COURT: Very well. I understand. Okay.

MR. BUTLER: Thank you, Your Honor.

This inquiry fails to satisfy two of the three requirements of N.C.G.S. § 15A-1242 that the trial court make thorough inquiry to ensure that defendant (1) understands and appreciates the consequences of his decision and; (2) comprehends the nature of the changes and proceedings and the range of permissible punishments.

Because defendant never clearly and unequivocally expressed his intention to proceed *pro se*, the trial court erred in allowing him to do so. Defendant, in the case *sub judice*, is entitled to a new trial.

SUSAN (ERICKSON) HUTTON, PLAINTIFF V. MELANIE LOGAN, DEFENDANT

No. COA01-351

(Filed 6 August 2002)

**1. Negligence— contributory—common law rescue doctrine—
Good Samaritan statute—reckless, wanton conduct, or
intentional wrongdoing**

A defendant who rear-ended plaintiff's car was not required to show that plaintiff's actions of stopping her car on the road during a rescue attempt of a third person amounted to reckless, wanton conduct, or intentional wrongdoing before the court could find plaintiff contributorily negligent, because: (1) plaintiff's reliance on the common law rescue doctrine in the present case is misplaced when the doctrine allows the rescuer to maintain an action against the tortfeasor who caused the peril that necessitated the rescue attempt, and the tortfeasor was not defendant; and (2) N.C.G.S. § 20-166(d), the Good Samaritan statute, insulates the rescuer from liability for ordinary negligence from the person rescued only.

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2. Negligence— contributory—directed verdict—parking on the traveled portion of a highway

The trial court did not err in an action arising out of an automobile accident by directing verdict in favor of defendant on the issue of contributory negligence as a matter of law on the basis of the statutory violation of N.C.G.S. § 20-161 which prohibits parking on the traveled portion of a highway, because: (1) while plaintiff may have raised a question of fact for the jury as to whether her stop was a necessary one, it is uncontested that she had no disabling condition which caused her to stop her vehicle in the eastbound traffic lane; and (2) it is negligence to park a vehicle on the paved surface of a highway where there is sufficient space to stop on the shoulders except in cases of disablement, and plaintiff herself acknowledged that her vehicle was not disabled.

Appeal by plaintiff from judgment entered 23 August 2000 by Judge Orlando F. Hudson in Orange County Superior Court. Heard in the Court of Appeals 22 January 2002.

R. Bradley Miller for plaintiff appellant.

Moore & Van Allen, PLLC, by Lewis A. Cheek and Michael A. DeFranco, for defendant appellee.

McCULLOUGH, Judge.

Plaintiff Susan (Erickson) Hutton appeals the trial court's granting of defendant Melanie Logan's motion for directed verdict entered 23 August 2000 finding that plaintiff was contributorily negligent as a matter of law.

The suit by plaintiff arose from an automobile accident that occurred on 19 January 1994 in Orange County. The accident occurred on Dairyland Road, which was described by plaintiff at trial as "a country road" through "beautiful rolling countryside." The accident happened around 5:00 p.m. on a clear but cold day.

Plaintiff was driving east through a curve described as long and sweeping. She came upon a wreck in which a car had gone into the ditch on the other side of the road. Plaintiff testified that "it looked real bad." Another car had stopped in the westbound lane apparently in an attempt to render assistance to the wrecked vehicle and driver. Plaintiff and the other car were the first to arrive on the scene.

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Plaintiff slowed as she approached and stopped when her car pulled even with the car in the ditch. It was her intention to inform the driver of the other stopped vehicle that she would drive ahead and call 911. It was obvious to plaintiff that a rescue squad would probably be needed.

Although plaintiff had not noticed anyone behind her, defendant was following plaintiff. There is conflicting evidence as to whether plaintiff checked her rearview mirror, but plaintiff at best testified that she could not swear that she did, but that she usually does while driving. According to plaintiff, she had stopped for only a "flicker" when defendant struck her vehicle from behind. Defendant, traveling at approximately 50 m.p.h. left 29 feet of tire impressions on the road according to the officer on the scene. Plaintiff had not even had a chance to roll down her window before defendant hit her vehicle. Defendant stated to the officer that "she became distracted by [the car in the ditch] . . . [she] then turned her attention back to the roadway and saw [Ms. Erickson's car] stopped in the roadway and was unable to decrease speed and collided." The officer made no mention of anything potentially obstructing the view or vision of the path of the road through the curve.

At the point where plaintiff stopped her car, there was no shoulder on the right side of the road. There was shoulder area located before and after the accident site where a car could have parked so as to be completely out of the road. Defendant contends in her brief that there were also some bushes on the right side of the road just ahead of where plaintiff stopped her car that obstructed her view of the accident until she was upon it, although she never so testified at trial.

After the officer on the scene and plaintiff testified, defendant made a motion for a directed verdict on contributory negligence which was granted and entered on 23 August 2000. Plaintiff appeals.

Plaintiff makes the following assignment of error: The trial court's granting of defendant's motion for directed verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure at the conclusion of plaintiff's evidence, was error on the ground that plaintiff's evidence did not establish as a matter of law that plaintiff's own negligence contributed to the injury and damage suffered by her.

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I.

[1] Plaintiff first contends that her conduct cannot constitute contributory negligence unless it was found to be reckless, relying on the common law “rescue doctrine” and N.C. Gen. Stat. § 20-166(d) (2001). We disagree.

The rescue doctrine requires a tortfeasor to anticipate the possibility “some bystander will yield to the meritorious impulse to save life or even property from destruction, and attempt a rescue.” Thus, where applicable, the doctrine stretches the foreseeability limitation to help bridge the proximate cause gap between defendant’s act and plaintiff’s injury. . . .

. . . .

. . . This doctrine was intended to encourage the rescue of others from peril and immediate danger by insulating the rescuer from contributory negligence claims, and by holding the tortfeasor liable for any injury to the rescuer on the grounds a rescue attempt is foreseeable. The underlying premise recognizes the need to bring an endangered person to safety.

Westbrook v. Cobb, 105 N.C. App. 64, 69, 411 S.E.2d 651, 654 (1992) (citations omitted). Further,

“[t]he rule is well settled that one who sees a person in imminent and serious peril caused by the negligence of another cannot be charged with contributory negligence, as a matter of law, in risking his own life or serious injury in attempting to effect a rescue, provided the attempt is not recklessly or rashly made.”

Caldwell v. Deese, 288 N.C. 375, 380, 218 S.E.2d 379, 382 (1975) (quoting *Alford v. Washington*, 238 N.C. 694, 78 S.E.2d 915 (1953)).

Plaintiff contends that she was a rescuer, and thus cannot be found to have been contributorily negligent in her actions involved with the rescue unless her attempt was recklessly made. Plaintiff’s reliance on the rescue doctrine in the present case is misplaced. The doctrine allows the rescuer to maintain an action against the tortfeasor who caused the peril that necessitated a rescue attempt. It operates to prevent that tortfeasor from asserting contributory negligence as a defense to the rescuer’s suit unless the rescuer’s actions were indeed reckless. See *Britt v. Mangum*, 261 N.C. 250, 134 S.E.2d 235 (1964); *Partin v. Power and Light Co.*, 40 N.C. App. 630, 253

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S.E.2d 605, *disc. review denied*, 297 N.C. 611, 257 S.E.2d 219 (1979). In the present case it is unclear who the tortfeasor was, but it was certainly not defendant. She in no way necessitated the rescue. The person to be rescued here may have in fact been the tortfeasor, in which case plaintiff would be able to benefit from the doctrine in a suit against her. Had plaintiff filed suit against the person in the ditch, if they were in fact negligent in ending up there, that party would have to show that plaintiff was reckless in stopping her vehicle where she did. Defendant was a third party who had nothing to do with the original peril. The common law rescue doctrine thus has no applicability as to defendant in this case.

Plaintiff also relies on N.C. Gen. Stat. § 20-166(d) (2001). This statute reads:

Any person who renders first aid or emergency assistance at the scene of a motor vehicle accident on any street or highway to any person injured as a result of such accident, shall not be liable in civil damages for any acts or omissions relating to such services rendered, unless such acts or omissions amount to wanton conduct or intentional wrongdoing.

Id. This statute, known as the “Good Samaritan” statute, was passed by the General Assembly in 1965. 1965 N.C. Sess. Laws ch. 176, § 1. However, we have been unable to find any cases from our courts that have dealt with or interpreted this statute. Thus, its interpretation is a matter of first impression.

“In construing the meaning of a statute, this Court must effectuate the intent of the legislature, which is revealed in ‘the language of the statute, the spirit of the statute, and what it seeks to accomplish.’ ” *State v. Coronel*, 145 N.C. App. 237, 246, 550 S.E.2d 561, 568 (2001), *disc. review denied*, 355 N.C. 217, 560 S.E.2d 144 (2002) (quoting *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 444 (1983)).

The plain language of the statute reveals that it seeks to insulate anyone who stops at the scene of an accident and renders assistance to someone injured in that accident from civil suit unless their actions were well beyond ordinary negligence. The statute, as written, appears open to interpretation on the question of the party from whom the rescuer is insulated: the one to whom he is rendering assistance or anyone the rescuer may come into contact with while he is rendering aid.

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Defendant submits that N.C. Gen. Stat. § 20-166(d) only applies to the persons to whom the services are rendered, and not a later-appearing third party. Accordingly, a rescuer could not be sued successfully in negligence by one that he or she has rescued unless his or her acts amounted to wanton conduct or intentional wrongdoing. Yet the rescuer could be held liable for his or her own ordinary negligence during the course of the rescue to any other third party.

On the other hand, the language in our statute does not appear to mandate this result. The insulating terms of our statute are very broad: “Any person who renders first aid or emergency assistance . . . shall not be liable in civil damages for any acts or omissions relating to such services rendered[.]” This broad language could be read to include ordinary negligence as it pertained to third parties. Take, for instance, the facts in the present case: a would-be rescuer stopped in the road, perhaps negligently, to render assistance. A third party rear-ends the rescuer and sues the rescuer in negligence. The stopping on the road to render assistance by the rescuer qualifies as services rendered. The statute says that the rescuer cannot be held liable for negligence relating to “such services rendered” unless they were proven to amount to wanton conduct or intentional wrongdoing.

Suffice it to say that our legislature could have included more language and made clearer their true intent. *See, e.g., Maine’s Good Samaritan Statute:*

[A]ny person who voluntarily, without the expectation of monetary or other compensation from the person aided or treated, renders first aid, emergency treatment or rescue assistance to a person who is unconscious, ill, injured or in need of rescue assistance, shall not be liable for damages for injuries *alleged to have been sustained by such person nor for damages for the death of such person alleged to have occurred by reason of an act or omission in the rendering of such first aid, emergency treatment or rescue assistance*, unless it is established that such injuries or such death were caused willfully, wantonly or recklessly or by gross negligence on the part of such person.

Me. Rev. Stat. Ann. T. 14, § 164 (2001).

Plaintiff in the present case would benefit from N.C. Gen. Stat. § 20-166(d) if the broad language allowed her to assert an in-

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creased standard of accountability as a reply to the implication of contributory negligence, and thus be insulated as to the third party, Ms. Logan.

A glance at the phenomenon of Good Samaritan statutes across the country reveals the intent behind them. "Good Samaritan statutes are generally designed to protect individuals from civil liability for any negligent acts or omissions committed while voluntarily providing emergency care." Danny R. Veilleux, J.D., Annotation, *Construction and Application of "Good Samaritan" Statutes*, 68 A.L.R. 4th 294, 299-300 (citing "Good Samaritan Laws—The Legal Placebo: A Current Analysis," 17 Akron L. Rev. 303 (Fall 1983)); see also Jerry M. Trammell, *Torts—North Carolina's "Good Samaritan" Statute*, 44 N.C.L. Rev. 508 (1966). Most states passed a version of these statutes after the first one passed in 1959. *Id.*

The statutes generally attempt to eliminate the perceived inadequacies of the common-law rules, under which a volunteer, choosing to assist an injured person although having no duty to do so, was liable for failing to exercise reasonable care in providing the assistance.

....

The classes of persons protected by Good Samaritan legislation vary, and some jurisdictions have a number of statutes, each extending immunity to a different class. Many jurisdictions extend immunity to all persons administering emergency care; others limit coverage to specified medical personnel or to physicians alone. Good Samaritan statutes often require the person providing the emergency care to do so "in good faith" and without expecting payment for the assistance in order to qualify for the statutory immunity. Some statutes limit immunity to emergency aid provided in specific locations, and some to aid exercised according to a specific standard of conduct.

Annotation, "Good Samaritan" Statutes, 68 A.L.R.4th 300-01 (1989). The general concentration of these statutes is on insulating the rescuer from liability for negligence to the person rescued. There may be a difference of opinion as to which party is insulated from liability, but there seems to be no debate as to the party from whom they are insulated. No jurisdiction has apparently said that a Good Samaritan has immunity for ordinary negligence as to anyone, be it the person rescued or third party alike.

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While our legislature could have been more precise in its language granting immunity to the Good Samaritan, we hold that N.C. Gen. Stat. § 20-166(d) insulates the rescuer from liability for ordinary negligence from the person rescued only. In light of the intent behind Good Samaritan statutes to remedy the gap left by the common law in allowing the person rescued to sue the rescuer, it does not appear reasonable that our legislature intended to provide a blanket immunity as to all persons other than the person rescued. Rescuers must stand on their own and defend suits maintained by third parties who were allegedly injured as a result of the rescuer's negligent conduct during the rescue attempt.

These contentions are overruled. Defendant was not required to show that plaintiff's actions during the rescue attempt amounted to reckless, wanton conduct, or intentional wrongdoing before the court could find plaintiff contributorily negligent. We now review the granting of the directed verdict on the basis that plaintiff's actions were negligent as a matter of law.

II.

[2] Plaintiff contends that the trial court erred in granting defendant's motion for directed verdict on the ground that plaintiff was contributorily negligent as a matter of law. We disagree.

" '[A] directed verdict for defendant on the basis of contributory negligence [is] proper only if the evidence, taken in the light most favorable to the plaintiff [establishes plaintiff's] negligence so clearly that no other reasonable conclusion could [be] drawn therefrom.' " *Kutz v. Koury Corp.*, 93 N.C. App. 300, 304-05, 377 S.E.2d 811, 814 (1989) (quoting *Fields v. Chappell Associates*, 42 N.C. App. 206, 208, 256 S.E.2d 259, 260 (1979)).

Defendant alleged in her answer and in her motion for directed verdict that plaintiff violated N.C. Gen. Stat. § 20-161(a) which prohibits parking on the traveled portion of a highway.

N.C. Gen. Stat. § 20-161 is a safety statute which regulates stopping on the highway. It reads:

(a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled portion of any highway or highway bridge outside municipal corporate limits unless the vehicle is disabled to such an extent that it is impossible to avoid stopping and temporarily leaving the

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vehicle upon the paved or main traveled portion of the highway or highway bridge.

(b) No person shall park or leave standing any vehicle upon the shoulder of a public highway outside municipal corporate limits unless the vehicle can be clearly seen by approaching drivers from a distance of 200 feet in both directions and does not obstruct the normal movement of traffic.

N.C. Gen. Stat. § 20-161(a), (b) (2001). “It is well established that an unexcused violation of N.C.G.S. 20-161 is negligence per se. To be actionable, negligence in parking a vehicle on a public highway in violation of this statute must be a proximate cause of the injury in suit.” *Adams v. Mills*, 312 N.C. 181, 188, 322 S.E.2d 164, 169 (1984) (citations omitted).

A preliminary question is whether plaintiff’s vehicle was located on the highway when the accident occurred. This point is uncontested by the parties. There is ample evidence in the record, including plaintiff’s admission, that her vehicle was located on the road when the collision occurred, and her vehicle was not disabled.

Thus, we now turn to the question of whether plaintiff’s evidence proves a statutory violation as a matter of law. “In construing G.S. 20-161(a) our courts have defined “parking” to be more than a temporary or momentary stop for a necessary purpose.” *Smith v. Pass*, 95 N.C. App. 243, 250, 382 S.E.2d 781, 786 (1989); *see Adams*, 312 N.C. at 190, 322 S.E.2d at 170 (stating, “the words ‘park’ and ‘leave standing’ in N.C.G.S. 20-161 have been construed so as to exclude a mere temporary or momentary stoppage for a necessary purpose.”). *Id.* However, a motorist wishing to avail him or herself of this defense to a statutory violation must meet a two-part test defined as follows:

In determining whether a violation of G.S. 20-161(a) has occurred, the trier of fact must consider whether the stop, even if temporary, was for a necessary purpose and “ ‘under such conditions that it [was] impossible to avoid leaving such vehicle in such a position.’ ”

Smith, 95 N.C. App. at 250, 382 S.E.2d at 786 (emphasis added) (quoting *Melton v. Crotts*, 257 N.C. 121, 129, 125 S.E.2d 396, 402 (1962) (quoting *Capital Motor Lines v. Gillette*, 235 Ala. 157, 177 So. 881 (1935)). “Whether a vehicle stopped on the travel portion of the road was for a necessary purpose is ‘ordinarily a question for the jury

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unless the facts are admitted.' " *Id.* at 256, 382 S.E.2d at 789 (quoting *Melton*, 257 N.C. at 130, 125 S.E.2d at 402)).

Here, plaintiff admitted in her trial testimony that she deliberately chose to stop her vehicle in the eastbound lane of travel. Plaintiff also acknowledged that there were other nearby locations where the shoulder offered ample room to park her vehicle without obstructing her lane of travel. While she may have raised a question of fact for the jury as to whether her stop was a "necessary" one, it is uncontested that she had no disabling condition which caused her to stop her vehicle in the eastbound traffic lane.

As the *Adams* Court noted, "[e]xcept in cases of disablement, it is negligence to park a vehicle on the paved surface of a highway when there is sufficient space to stop on the shoulders." *Adams*, 312 N.C. at 188, 322 S.E.2d at 169 (emphasis added). As the plaintiff herself acknowledged that her vehicle was not disabled, it was proper for the trial court to direct a verdict in favor of defendant.

In light of our ruling that the trial court's order directing verdict in favor of defendant on the issue of contributory negligence as a matter of law on the basis of the statutory violation of N.C. Gen. Stat. § 20-161 was proper, the ruling below is

Affirmed.

Chief Judge EAGLES and Judge CAMPBELL concur.

EDWARD BOYNTON, PLAINTIFF-APPELLEE V. ESC MEDICAL SYSTEM, INC. F/K/A LUXAR CORPORATION, LUXAR CORPORATION AND VISTA MEDICAL SYSTEMS, INC.,
DEFENDANTS-APPELLANTS

No. COA01-635

(Filed 6 August 2002)

1. Appeal and Error— appealability—right to arbitrate

The right to arbitrate is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore appealable even if all of the issues between the parties have not been resolved.

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2. Arbitration and Mediation— federal act—state act preempted

The Federal Arbitration Act (FAA) preempts the North Carolina Uniform Arbitration Act when the contract containing an arbitration clause involves interstate commerce.

3. Arbitration and Mediation— forum selection clause—inter-state agreement

An action for breach of a contract involving sales commissions was remanded for entry of an order granting defendant Luxar's motion to dismiss for failure to state a claim, with Luxar being free to seek arbitration in the State of Washington. The parties contemplated interstate commerce at the time their agreement was executed and the forum selection clause agreement in the arbitration provision was valid under the FAA.

4. Arbitration and Mediation— mutual agreement—voluntary submission

The trial court did not err by denying defendant ESC's motions to dismiss and to compel arbitration where ESC was a successor corporation which merely volunteered for arbitration. A party seeking to compel arbitration must prove the existence of a mutual agreement to arbitrate; voluntary submission to arbitration opposed by the other party does not constitute mutual agreement. However, the action as to ESC was stayed pending resolution of arbitrable claims in the State of Washington.

Appeal by defendants from order entered 7 February 2001 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 20 February 2002.

Thomas B. Kobrin, for plaintiff-appellee.

Tuggle, Duggins & Meschan, P.A., by Scott C. Gayle, J. Reed Johnston, Jr., and Amanda L. Fields, for defendants-appellants.

BRYANT, Judge.

Defendants LUXAR Corporation and ESC Medical System, Inc., appeal from the trial court's denial of their motions: 1) to compel arbitration; 2) for automatic stay; and 3) to dismiss.

Defendant LUXAR Corporation and plaintiff Edward Boynton executed a Sales Representative Agreement [Agreement] on 1 July 1997. LUXAR was a Washington corporation with its principal place

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of business in Bothell, Washington. LUXAR manufactured and sold waveguide fibers, CO₂ lasers and other medical products. Boynton was a sales representative operating out of Greensboro, North Carolina.

The Agreement provided that Boynton would be LUXAR's exclusive independent sales representative in North Carolina and South Carolina. Boynton received commissions based on the net invoice price of all purchase orders placed with LUXAR. The Agreement contained an arbitration clause and a forum selection clause requiring arbitration in King County, Washington, if conflicts arose. According to Boynton, LUXAR was either acquired by ESC Medical Systems or ESC assumed LUXAR's debts in July 1997. Boynton was terminated by ESC in 1998.

On 2 October 2000, Boynton filed a complaint against LUXAR, ESC and Vista Medical Systems, Inc. Boynton alleged that Vista purchased medical equipment directly from LUXAR and ESC, then sold the equipment in Boynton's geographic territories, cutting Boynton out as the middle person. Boynton brought claims against LUXAR and ESC for breach of contract, against Vista for tortious interference with contract, and against LUXAR, ESC and Vista for fraud and unfair and deceptive trade practices.

On 15 November 2000, LUXAR sent Boynton and his attorney a letter demanding mandatory binding arbitration in Washington pursuant to the Agreement. The letter requested a response by 28 November 2000. Neither Boynton nor his attorney responded to LUXAR's request for arbitration. On 1 December 2000, LUXAR and ESC filed motions to compel arbitration, for automatic stay, and to dismiss. On 7 February 2001, the Guilford County Superior Court denied the motions. Defendants LUXAR and ESC appealed.

[1] Defendants assign as error the trial court's denial of their motions to compel arbitration, for automatic stay and to dismiss. We first determine whether defendants' appeal is from an interlocutory order, and, as such, should be dismissed. Generally, there is no right to appeal from an interlocutory order. *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000). " 'An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy.' " *Id.* at 141, 526 S.E.2d at 669 (quoting *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995)). An appeal from an inter-

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locutory order may be taken under two circumstances: 1) the order is final as to some but not all the parties and there is no just reason to delay the appeal; or 2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed. *Id.*; see N.C.G.S. §§ 1-277(a), 7A-27(d) (2001).

In this case, defendants appeal from an interlocutory order because all issues between the parties have not been resolved. See *Raspet v. Buck*, 147 N.C. App. 133, 554 S.E.2d 676 (2001). However, “[t]he right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable.” *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 118, 516 S.E.2d 879, 881 (1999), review denied, 350 N.C. 832, 539 S.E.2d 288, cert. denied, 528 U.S. 1155, 145 L. Ed. 2d 1072 (2000).

I. The Arbitration Acts

[2] North Carolina public policy strongly favors arbitration. *Miller v. Two State Constr. Co.*, 118 N.C. App. 412, 455 S.E.2d 678 (1995). “The question of whether a dispute is subject to arbitration is an issue for judicial determination.” *Raspet*, 147 N.C. App. at 136, 554 S.E.2d at 678. Our review of the trial court’s determination as to whether a dispute is subject to arbitration is *de novo*. *Id.* Contract law determines whether a dispute is subject to arbitration. *Id.* at 135, 554 S.E.2d at 678.

Although not raised by the parties, we must first determine whether state or federal law, i.e., the Federal Arbitration Act [FAA] or North Carolina’s Uniform Arbitration Act [UAA], applies to this action. The Federal Arbitration Act states:

A written provision in any maritime transaction or a *contract evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1999) (emphasis added). Our UAA, however, states in pertinent part that “any provision in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard

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in another state is against public policy and is void and unenforceable." N.C.G.S. § 22B-3 (2001).

This Court has previously addressed the issue of which arbitration act applies. In *Eddings v. S. Orthopedic and Musculoskeletal Assocs., P.A.*, 147 N.C. App. 375, 383, 555 S.E.2d 649, 654 (2001) (pending appeal in our Supreme Court), this Court held that the FAA—versus North Carolina's UAA—governed an arbitration clause because the contract containing the arbitration clause involved interstate commerce. In *Eddings*, plaintiff-doctor signed an employment contract with Asheville Orthopedic Associates [AOA]. Because AOA was soon to merge with Southern Orthopedic and Musculoskeletal Associates, P.A. [SOMA], plaintiff was also required to sign two employment agreements with SOMA. The SOMA agreements contained arbitration clauses and one of the agreements contained a covenant not to compete. Plaintiff became disgruntled after approximately seventeen months of work, then obtained employment with a competing orthopedic practice in Asheville despite the covenant not to compete. SOMA filed a request for arbitration to try to settle its dispute with plaintiff. Plaintiff, however, filed an action alleging misrepresentation, fraud and unfair or deceptive trade practices, and requested a stay of the arbitration proceeding. Plaintiff also sought a declaratory judgment that the first SOMA agreement signed by plaintiff was unconscionable and void as against public policy. SOMA filed a motion to dismiss the complaint and to compel arbitration.

The trial court granted plaintiff's motion to stay arbitration, and denied SOMA's motion to compel arbitration and to dismiss plaintiff's complaint on the grounds that the employment agreements were procured by fraud, and the terms were unconscionable, vague and indefinite such that there was no meeting of the minds between the parties. *Id.* at 383, 555 S.E.2d at 654-55. Therefore, plaintiff was not required to submit to binding arbitration. On appeal, this Court reversed. Although neither party raised the issue, the *Eddings* Court held that the SOMA agreement was properly within the scope of the FAA, which preempts state law where the contract involves interstate commerce. Because plaintiff moved from Chattanooga, Tennessee, to take employment with AOA and SOMA, the transaction involved interstate commerce.¹ *Id.* at 383, 555 S.E.2d at 654. Based on

1. The dissent argued that the case should be remanded to the trial court to determine whether the agreement involved interstate commerce because there were not enough facts before the *Eddings* Court. The issue is pending before our Supreme Court.

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Eddings, it is apparent that the contract in this case contains an arbitration clause which involves interstate commerce, and is therefore governed by the FAA.

Furthermore, the United States District Court for the Middle District of North Carolina has specifically addressed the issue of whether the FAA preempts our UAA's provision that renders a forum selection clause void. In *Newman ex rel. Wallace v. First Atlantic Resources Corp.*, 170 F. Supp. 2d 585 (M.D.N.C. 2001), plaintiff brought actions against four Florida residents—two corporations and their two presidents—alleging, *inter alia*, fraud, negligent misrepresentation, breach of fiduciary duty, unjust enrichment and unfair or deceptive trade practices. Defendants were precious metal brokers who entered into agreements with plaintiff, an investor residing in North Carolina. The commodities trading agreement with one of the defendants, Global Asset Management, Inc., contained arbitration, choice-of-law and forum selection provisions requiring the parties to arbitrate in Florida. The defendants made motions to compel arbitration and dismiss, or, in the alternative, to change venue to Florida. The district court dismissed plaintiff's claims against Global and its president. *Id.* at 594.

In reaching its decision, the district court considered *sua sponte* whether federal law (the FAA) preempted North Carolina state law (the UAA). Specifically, the district court considered for the first time whether the forum selection clause in the arbitration provision, which would be invalid under our State statutes, was valid and enforceable under the FAA. The district court concluded that because the forum selection clause would be void as against public policy under N.C.G.S. § 22B-3, it *might* conflict with Section 2 of the FAA. Section 2 states that an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."² *Id.* at 592 (quoting 9 U.S.C. § 2).

2. We note that N.C.G.S. § 22B-3 of the UAA does not constitute a ground at law for the revocation of a contract such that the FAA would not apply. Our Supreme Court followed the United States Supreme Court's holding in *Doctor's Assocs. v. Cassarotto*, 517 U.S. 681, 134 L. Ed. 2d 902 (1996), in interpreting the FAA as follows:

The Federal Arbitration Act (FAA) provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." The essential thrust of the FAA is to preclude state courts "from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" Thus, state courts may not invalidate arbitration agreements on grounds different from those upon which they invalidate contracts.

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The district court also concluded that N.C.G.S. § 22B-3 may conflict with Section 4 of the FAA, which provides that parties to an arbitration agreement may be directed by the court to proceed with the arbitration in accordance with the terms of the agreement. *Id.* (citing 9 U.S.C. § 4). The Supremacy Clause of the United States Constitution provides that federal laws supercede state laws in conflict with federal laws. *Id.* at 592; *see* U.S. Const. art. VI, § 2. In dismissing plaintiff's claims against Global and its president, the district court stated,

Because the FAA preempts NCGS § 22B-3 and unfairness does not result from compliance with the forum-selection clause, arbitration of Plaintiff's claims against Global and [its president] must be held in . . . Florida. This court cannot compel arbitration in another district. Therefore, Plaintiff's claims against Global and [its president] will be dismissed without prejudice, and Plaintiff may pursue arbitration in Florida.

Newman, 170 F. Supp. 2d at 593 (citations omitted).

We find *Newman* instructive and conclude that the FAA preempts N.C.G.S. § 22B-3 and does not nullify the arbitration agreement or the forum selection clause.

II. LUXAR Corporation

[3] In the case *sub judice*, the contract between LUXAR and Boynton contained the following provision:

Any controversy or dispute arising out of or relating to this Agreement shall be submitted to binding arbitration in King County, Washington, under the then existing Commercial Arbitration rules of the American Arbitration Association. Such decision may grant legal and equitable relief, including but not limited to injunction, and may grant any other form of relief appropriate. Judgment may be obtained on the arbitration award in any court having competent jurisdiction.

Boynton acknowledges the existence of this provision in his brief. We see nothing in the record indicating that the contract is invalid. The arbitration provision includes a forum selection clause naming King

Trafalgar House Constr. v. MSL Enters., 128 N.C. App. 252, 257, 494 S.E.2d 613, 616-17 (1998) (citations omitted) (citing *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 684, 134 L. Ed. 2d 902, 908 (1996)). In other words, "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Casarotto*, 517 U.S. 681, 686-87, 134 L. Ed. 2d 902, 909 (1996).

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County, Washington, as the appropriate jurisdiction in which to arbitrate.

Boynton argues that N.C.G.S. § 22B-3 renders the forum selection provision void as against public policy. We disagree. The Agreement provided that Boynton would be LUXAR's exclusive independent sales representative in North Carolina and South Carolina. Furthermore, Boynton is a resident of North Carolina and LUXAR is a resident of Washington. "The significant question . . . [in determining whether a contract evidences a transaction involving commerce], is not whether, in carrying out the terms of the contract, the parties *did* cross state lines, but whether, at the time they entered into it and accepted the arbitration clause, they *contemplated* substantial interstate activity." *In re Cohoon*, 60 N.C. App. 226, 229, 298 S.E.2d 729, 731 (1983) (alteration in original) (quoting *Burke County Public Schools Bd. of Educ. v. Shaver P'ship*, 303 N.C. 408, 279 S.E.2d 816 (1981)) (holding that evidence supported finding that interstate commerce had been contemplated such that FAA applied). The evidence is undisputed that Boynton's exclusive territory covered two states,³ and that the parties resided in different states. Therefore, we conclude that the parties contemplated interstate commerce at the time the Agreement was executed and that the forum selection clause in the arbitration provision was valid under the FAA. Accordingly, we hold that the trial court erred in denying LUXAR's motion to dismiss for failure to state a claim. We remand to the trial court for entry of an order granting LUXAR's motion to dismiss Boynton's complaint. LUXAR may seek arbitration in the State of Washington pursuant to the forum selection clause.

III. ESC Medical Systems, Inc.

[4] "The party seeking to compel arbitration must prove the existence of a mutual agreement to arbitrate." *Thompson v. Norfolk S. Ry.*, 140 N.C. App. 115, 120, 535 S.E.2d 397, 400 (2000). It is unclear from the record that ESC was a party to the Agreement between LUXAR and Boynton. Moreover, the legal coordinator for ESC admitted that ESC was not a party to the Agreement. She also denied all liability to Boynton, for the debts or obligations of LUXAR. Nevertheless, ESC sought to voluntarily submit itself to binding arbitration in

3. Because Boynton demanded payment of all commissions from sales within his exclusive territories, he implicitly acknowledges that the parties contemplated interstate commerce at the time the Agreement was executed. Furthermore, the fact that Boynton seeks damages for breach of contract indicates that the validity of the contract is not in dispute.

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Washington for any claims arising out of the Agreement between LUXAR and Boynton. We conclude that ESC failed to prove the existence of a *mutual* agreement to arbitrate; merely voluntarily agreeing to arbitrate when Boynton refused to do so does not constitute a mutual agreement. We therefore conclude that the motion to arbitrate as to ESC should be denied. Accordingly, the trial court did not err in denying the motions to compel arbitration and to dismiss.

However, we conclude that denying the motion for automatic stay was in error. ESC may be able to arbitrate its claims in an arbitration proceeding involving LUXAR and plaintiff. If ESC is not entitled to arbitration, plaintiff may nevertheless pursue its claims in North Carolina, absent additional jurisdictional challenges. Meanwhile, the action as to ESC should be stayed pending resolution of the arbitrable claims in the State of Washington. Therefore, we reverse the lower court's denial of the automatic stay and remand to the trial court for entry of an order granting defendant ESC's motion to stay the present action pending completion of the arbitration, if any. Thereafter, a determination can then be made by the trial court as to what, if any, claims remain against ESC.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

As to defendant LUXAR, the trial court's order denying LUXAR's motion to dismiss is **REVERSED** and **REMANDED** with instructions to enter an order dismissing Boynton's complaint. LUXAR is free to pursue arbitration in the State of Washington.

As to defendant ESC, the trial court's order denying ESC's motions to compel arbitration and to dismiss is **AFFIRMED**. The trial court's order denying ESC's motion for automatic stay is **REVERSED** and **REMANDED** to the trial court with instructions to stay this action to allow the parties to seek arbitration in the State of Washington.

Judges WALKER and HUNTER concur.

GILBERTO v. WAKE FOREST UNIV.

[152 N.C. App. 112 (2002)]

REBECCA MYERS GILBERTO, EMPLOYEE, PLAINTIFF V. WAKE FOREST UNIVERSITY,
EMPLOYER, SELF INSURED (ITT/HARTFORD), THIRD-PARTY ADMINISTRATOR,
DEFENDANTS

No. COA01-955

(Filed 6 August 2002)

1. Workers' Compensation— continuing disability—failure to meet burden of proof

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee had not met her burden of proof to show a continuing disability, because: (1) the Commission could conclude based on the testimony of the expert witnesses that plaintiff had earning capacity based on her level of education and transferrable skills obtained while Director of Dance, and therefore, was not qualified for temporary total disability past 1 July 1995; and (2) although plaintiff contends the Commission erred by weighing defendants' expert testimony more heavily than that of her expert regarding plaintiff's reasonable efforts to obtain work, it is entirely within the discretion of the Commission to weigh the credibility of expert witnesses when making findings of fact.

2. Workers' Compensation— date of disability—admission by party

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee's disability began 1 January 1995, the date on which plaintiff's paid medical sabbatical began, instead of 1 September 1995, the date on which plaintiff began her unpaid leave of absence, because by plaintiff's own admission, her ability to compete in the marketplace was impaired as of 1 January 1995.

Appeal by plaintiff from opinion and award entered 20 February 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 May 2002.

Maureen Geraghty for plaintiff appellant.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Clayton M. Custer and Alison R. Bost, for defendant appellee.

GILBERTO v. WAKE FOREST UNIV.

[152 N.C. App. 112 (2002)]

TIMMONS-GOODSON, Judge.

Rebecca Myers Gilberto ("plaintiff") appeals from an opinion and award entered by the North Carolina Industrial Commission, ("the Commission"). For reasons stated herein, we affirm the opinion and award of the Commission.

Plaintiff suffered a compensable injury while employed as Director of Dance by Wake Forest University ("defendant-employer"). Defendant-employer is a duly qualified self-insured and ITT Hartford is the Third Party Administrator ("Third Party Administrator") (collectively, "defendants"). In April of 1993, plaintiff was diagnosed with plantars fasciitis, Achilles tendinitis, and retrocalcaneal bursitis, which are compensable occupational diseases for dancers. On 24 March 2000, a deputy commissioner for the Commission awarded plaintiff disability compensation from 1 September 1995 through 15 August 1996 and partial disability compensation from 15 August 1996 for a period of not greater than 300 weeks from the date of the injury. Defendants were also awarded a credit for salary paid to plaintiff from 1 January 1995 until 31 August 1995.

From this award, plaintiff filed a Motion to Reconsider the Opinion and Award, and on 19 April 2000, the deputy commissioner awarded plaintiff disability compensation at a rate of \$478.00 per week from 1 September 1995 through 31 December 1995 and partial disability compensation from 1 January 1996 for a period not greater than 300 weeks.

Defendants appealed the award to the Commission, which granted plaintiff temporary total disability compensation at a rate of \$478.00 per week from 1 January 1995 through 1 July 1995 and permanent partial disability compensation at the same rate, subject to defendants' credit for wage replacement benefits from January until July 1995. In awarding plaintiff benefits the Commission found the following pertinent facts:

3. Plaintiff has an Associate degree from Indiana University Community College and a Bachelor of Science degree in physical education from Ball State University.
5. Plaintiff received a Master's degree in physical education from Ball State University in 1979. This program does not include sports physiology and . . . assist[s] individuals to become gym teachers. Plaintiff did not take dance, speech, or fine arts programs while obtaining her . . . degrees.

GILBERTO v. WAKE FOREST UNIV.

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7. In 1981, defendant[-employer] hired plaintiff as a physical education instructor. Plaintiff subsequently taught foundations of physical education, gymnastics, social dance, beginning dance, and dance company.

8. The dance company class culminated in a student dance concert that plaintiff choreographed, directed, and produced.

12. Plaintiff also taught dance history, a lecture class, during summer school.

13. In 1992, plaintiff was promoted to dance director . . . and continued to teach the same classes she had taught as a dance instructor. As dance director, plaintiff performed some administrative duties such as preparing program brochures for student performances. Plaintiff did not have any clerical assistance or staff. Plaintiff's responsibilities included submitting an annual grant application . . . and overseeing the department's \$6,000.00 budget.

14. In April 1993, plaintiff began experiencing problems with her right foot. Dr. David Janeway, an orthopedic specialist, treated plaintiff.

16. In January 1994, Dr. Janeway recommended that plaintiff remain out of work for six weeks. Plaintiff did not take time off work despite this recommendation. . . . Dr. Janeway placed a hard cast on plaintiff's right foot. Plaintiff did not miss any work despite the cast.

17. Dr. Janeway recommended that plaintiff stay off her foot and consider other types of employment because of her right foot problems.

19. In the spring of 1994, plaintiff applied for a 6-month leave of absence that began on January 1, 1995. During the leave of absence, plaintiff was paid \$27,558.00, her full salary. . . . Furthermore, plaintiff was given discretionary leave pay through July and August, 1995.

20. In late December 1994 or early January 1995 plaintiff and her children moved to the Chicago area.

23. As of July 1, 1995, plaintiff reached maximum medical improvement of her compensable lower extremity right foot con-

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ditions. On August 15, 1996, Dr. Janeway assigned plaintiff a 7% permanent partial disability rating for her right foot.

24. On July 13, 1995, defendant granted plaintiff's request for a one-year unpaid leave of absence for the fall of 1995 through the spring of 1996. Defendant ceased all payments to plaintiff as of September 1, 1995.

25. After moving to the Chicago area, plaintiff applied for two jobs in January 1995, for three jobs in June 1995, and one job in August 1995. After September 1995, plaintiff's job search consisted of making only general inquiries about vacancies and reading the classified job sections of the newspaper.

27. Other than the part-time job at ATMCO [a sporting equipment company], plaintiff made no efforts to find a job from September 1995 until September 1996 when she sent out ten job application letters seeking part-time work. After the job ended at ATMCO, plaintiff made no efforts to find work until February 1999, three months prior to the hearing before the Deputy Commissioner.

31. Based upon the results of the functional capacity evaluation, Dr. Janeway stated that plaintiff was able to work full time with restrictions that she not be on her feet for periods greater than 2 hours and 2 hours off throughout the course of the day.

Based on the above-stated findings, the Commission made several conclusions of law, including:

3. [P]laintiff failed to meet her burden of showing continuing disability. She has been released to return to work by her treating physician. She has not made reasonable effort to obtain employment within her restrictions. Plaintiff has a Master's degree and extensive teaching and other work experience. Therefore, her age, education, experience, and training do not render a search for employment futile. For these reasons, plaintiff is not entitled to continuing total disability compensation beyond the date she reached maximum medical improvement.

The Commission awarded plaintiff temporary total disability compensation at a rate of \$478.00 per week from 1 January 1995 through 1 July 1995, subject to defendants' credit for wage replacement benefits during this period, and an award for permanent partial disability compensation at the same rate for a period of 10 and 6/7ths

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weeks. From said award, plaintiff appeals and defendants cross assign error.

[1] In her first assignment of error, plaintiff argues that the Commission erred in determining that she had not met her burden of proof to show a wage-earning disability. We disagree.

When reviewing a decision by the Commission, this Court considers “(1) whether competent evidence exists to support the Commission’s findings of fact, and (2) whether the Commission’s findings of fact justify its conclusions of law and decision.” *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405-6, 496 S.E.2d 790, 793 (1998). The Court examines whether there was competent evidence to support the Commission’s findings of fact, but it does not re-examine or weigh the evidence. *See Fish v. Steelcase, Inc.*, 116 N.C. App. 703, 708, 449 S.E.2d 233, 237 (1994), *cert denied*, 339 N.C. 737, 454 S.E.2d 650 (1995). We are bound by the Commission’s findings if they are supported by competent evidence, even if there is contrary evidence. In contrast, conclusions of law are fully reviewable. *See Richards v. Town of Valdese*, 92 N.C. App. 222, 225, 374 S.E.2d 116, 118 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 799 (1989).

Disability is defined under the Workers’ Compensation Act as “incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.” N.C. Gen. Stat. § 97-2(9) (2001). Plaintiff bears the burden of showing that she can no longer earn her pre-injury wages in the same or any other employment, and that the diminished earning capacity is a result of the compensable injury. *See Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). A plaintiff can meet this burden by offering: (1) medical evidence demonstrating that, as a consequence of the work related injury, the plaintiff is unable to work in any employment; (2) evidence that the plaintiff is capable of some employment, but after a reasonable effort, the plaintiff has been unable to obtain any employment; (3) evidence that the plaintiff is able to do some work, but that efforts to seek other work would be futile because of the plaintiff’s preexisting conditions, such as age, inexperience, or lack of education; or (4) evidence that the new employment is at a lower wage than the plaintiff earned before the injury. *See Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

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There is competent evidence in the record to support the Commission's conclusion that plaintiff failed to meet her burden of showing a continuing disability. Plaintiff's physician released her to return to work, with few restrictions other than a limitation on prolonged standing. Although plaintiff's condition prevented her from dance instruction, plaintiff's physical limitations were not so restrictive as to render her incapable of performing well in alternate employment. Defendants' expert testified that with plaintiff's level of education and transferrable skills obtained while Director of Dance, she would be able to find comparable employment at a commensurate wage. The Commission could conclude, based on the testimony of the expert witnesses, that plaintiff had earning capacity and therefore was not qualified for temporary total disability benefits past 1 July 1995.

Furthermore, we disagree with plaintiff's argument that the Commission erred in finding that plaintiff did not make reasonable efforts to obtain work. Plaintiff sent out twenty-six applications for jobs over a period of almost five years. Defendants' expert witness testified that a diligent search would entail sending twenty-five applications per week. Although plaintiff argues that the Commission erred in weighing defendants' expert testimony more heavily than that of her expert, it is entirely within the discretion of the Commission to weigh the credibility of expert witnesses when making findings of fact. *See Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). In the instant case, experts for both sides testified that plaintiff was capable of working and the record supports both the findings of fact made by the Commission and the conclusions of law based on those findings. We therefore overrule plaintiff's first assignment of error.

[2] In plaintiff's second assignment of error, she argues that the Commission erred in concluding that her disability began 1 January 1995. Plaintiff argues that there was no competent evidence for the Commission to choose 1 January 1995, the date on which plaintiff's paid medical sabbatical began, instead of 1 September 1995, the date on which plaintiff began her unpaid leave of absence. Plaintiff states that her paid leave was an employment benefit and was independent of her disability.

As stated *supra*, disability means "incapacity . . . to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9). "[A]n

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injured employee's earning capacity must be measured not by the largesse of a particular employer, but rather by the employee's own ability to compete in the labor market." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 437, 342 S.E.2d 798, 805 (1986). Therefore, "[w]ages paid an injured employee out of sympathy, or in consideration of his long service with the employer, clearly do not reflect his actual earning capacity." *Id.* at 437, 342 S.E.2d at 806. Plaintiff is essentially arguing that her wages during her paid leave of absence accurately reflected her ability to earn wages in the marketplace.

"The findings of the Industrial Commission are conclusive on appeal when supported by competent evidence even though there be evidence to support a contrary finding." *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 684. The record contains competent evidence for the Commission's finding that 1 January 1995, the date plaintiff stopped working for defendant-employer, is the proper date of the disability. Plaintiff had informed defendant-employer in spring of 1994 that she could no longer perform her job duties because of her injury and applied for the medical sabbatical leave. Clearly, by plaintiff's own admission, her ability to compete in the marketplace was impaired as of 1 January 1995. Thus, even though plaintiff was paid during her leave of absence, such leave cannot be considered evidence of her capacity to earn similar wages in the marketplace. See *Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 84, 155 S.E.2d 755, 761 (1967) ("A *fortiori* the act of [the] employer in paying [plaintiff's] wages in full from the date of the injury should not be determinative of the employee's disability"). The Commission could reasonably determine that the 1 January 1995 was the proper date of her disability. Plaintiff's second assignment of error is therefore overruled.

Defendants present three cross assignments of error, but given our resolution of the foregoing issues, we need not address defendants' arguments. The decision of the Commission is affirmed.

Judges MARTIN and THOMAS concur.

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VERNA F. CREASMAN, PLAINTIFF/APPELLEE v. CLINTON J. CREASMAN,
DEFENDANT/APPELLANT

No. COA01-828

(Filed 6 August 2002)

1. Judgments; Process and Service— default—service by publication—actual notice

The trial court did not abuse its discretion by denying defendant's motion to set aside default judgment based on an alleged lack of jurisdiction due to service by publication, because: (1) N.C.G.S. § 1A-1, Rule 4(j4) does not allow a party that receives timely actual notice to attack a judgment by default on the basis that the statutory requirement of due diligence as a condition precedent to service by publication was not met; (2) defendant's own affidavit and motion unequivocally state that he had actual notice of the pending action; and (3) service by publication could be had by plaintiff without first having an alias and pluries summons issued.

2. Judgments— default—failure to obtain attorney not excusable neglect

The trial court did not abuse its discretion by denying defendant's motion to set aside default judgment based on alleged excusable neglect when defendant was aware of the lawsuit because failure of a party to obtain an attorney is not excusable neglect, and neither is ignorance of the judicial process.

Appeal by defendant from judgment entered 26 March 2001 by Judge Zoro J. Guice, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 10 June 2002.

Gum & Hillier, P.A., by David R. Hillier, for plaintiff-appellee.

Smathers & Norwood, by Patrick U. Smathers, for defendant-appellant.

EAGLES, Chief Judge.

Defendant appeals from judgment denying his motion to set aside default judgment. After careful consideration of the briefs and record, we affirm.

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Verna Creasman ("plaintiff") is the mother of Tommy Creasman ("Tommy"). Tommy was married to the mother of Clinton Creasman ("defendant"). Tommy is not the natural father of defendant. While not blood relatives, plaintiff and defendant shared a grandmother-grandson relationship.

Plaintiff's husband died in September 1999. On 5 November 1999, plaintiff, a 75 year old woman, executed a durable power of attorney appointing defendant as her attorney-in-fact. On the same day, plaintiff conveyed her interest in certain real property in Buncombe County to defendant. Plaintiff revoked the power of attorney on 21 December 1999 and executed a new power of attorney naming her son, Lawrence Creasman, as attorney-in-fact.

Plaintiff commenced this action on 7 January 2000. In her complaint, plaintiff alleged that: defendant liquidated plaintiff's bank account in the amount of \$22,000.00; defendant converted plaintiff's social security checks; defendant coerced plaintiff into executing the deed transferring her Buncombe County property to him; defendant relocated plaintiff four times and failed to communicate her location to family members; defendant failed to provide for plaintiff's ordinary and usual needs; defendant removed all plaintiff's personal property from her former home; and defendant has attempted to sell plaintiff's former home. Plaintiff alleged that the defendant's actions were "without the willing consent of Plaintiff and have been to [the] detriment of Plaintiff."

The summons and complaint were returned unserved by the Haywood County Sheriff's Department on 11 February 2000. The summons indicated that the Sheriff's Department attempted service three times but was unable to locate defendant and that defendant did not live at the address listed on the summons. Plaintiff had an alias and pluries summons issued on 22 May 2000 with the same address for defendant. The alias and pluries summons was returned unserved on 24 June 2000. The summons indicated that after a "thorough and diligent search" the Sheriff's Department was "unable to locate anyone on Pennant Drive with [defendant's] name."

Plaintiff then commenced service of process by publication on 23 June 2000. The notice appeared in "The Enterprise Mountaineer" newspaper on 28 June, 5, 12 and 19 July 2000. Defendant found a Notice of Lis Pendens filed on 7 January 2000 which was posted at the property by plaintiff. Defendant obtained a copy of the complaint from the Buncombe County Clerk of Court's office. Defendant spoke

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with Terry Reep (“Reep”), his “church pastor, friend and advisor” about the complaint. They agreed that defendant would have to be personally served before he needed to appear in court.

After defendant neither appeared nor pled in the matter, plaintiff moved for entry of default and for default judgment on 13 September 2000. The Clerk of Superior Court for Buncombe County entered an entry of default against defendant on 14 September 2000. A hearing for the default judgment was scheduled for 4 October 2000. Defendant received in the mail a “Notice of Hearing” for the motion for default judgment.

The default judgment hearing was held in Buncombe County Superior Court before Judge James C. Baker on 4 October 2000. Defendant personally appeared at the hearing without counsel. The trial court entered judgment against defendant for \$22,000.00 and ordered that title to the Buncombe County “real property” be vested in the plaintiff.

Defendant moved on 8 January 2001 to set aside the judgment. Defendant alleged excusable neglect and alternatively, that the judgment was void due to the plaintiff’s failure to exercise due diligence prior to utilizing service by publication. The matter was heard in Buncombe County Superior Court before Judge Zoro J. Guice, Jr. The trial court denied defendant’s motion to set aside the judgment. Defendant appeals.

Defendant raises two issues on appeal. Defendant contends that the trial court erred by denying defendant’s motion to set aside judgment based on: (1) lack of jurisdiction due to improper service and (2) excusable neglect. After careful consideration, we affirm.

[1] Defendant first contends that the trial court erred by denying his motion to set aside the default judgment due to lack of jurisdiction causing the judgment to be void. Defendant argues that plaintiff did not exercise due diligence before utilizing service by publication. Defendant argues that plaintiff only attempted service by the Sheriff and that plaintiff made no attempt to find an accurate address after the first summons was returned. Defendant further contends that even if plaintiff exercised due diligence, the use of an expired summons invalidated service by publication. We are not persuaded.

A Rule 60(b)(4) motion “seeks relief from a final judgment or order which is void. This motion is addressed to the sound discretion

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of the court.” *County of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 157, 323 S.E.2d 458, 461 (1984). Our review of the trial court’s order is abuse of discretion. *Id.*

In its judgment, the trial court stated that defendant “is barred from raising issues concerning validity of the Default Judgment based upon Affidavit and testimony of Defendant in light of the provisions of North Carolina Rule of Civil Procedure 4(j4).” Rule 4(j4) of the North Carolina Rules of Civil Procedure states that “*Process or judgment by default not to be attacked on certain grounds.*— . . . No party that receives timely actual notice may attack a judgment by default on the basis that the statutory requirement of due diligence as a condition precedent to service by publication was not met.” G.S. § 1A-1, Rule 4(j4) (2001).

Defendant stated in his affidavit in support of his motion to set aside judgment that:

4. *I saw the Lis Pendens filed on January 7, 2000 posted at the real property which is the subject matter of the above-captioned matter.*
5. *After seeing the Lis Pendens, I went to the Buncombe County Clerk of Court and obtained a copy of the Complaint from the court file.*
6. *I then conferred with Terry Reep, who is my church pastor and a trusted friend and advisor. He and I agreed that I would need to have the Sheriff’s Department serve me with the Complaint before I would be required to go to court.*
7. *I did not seek any legal advice regarding the Complaint based upon my belief that I had not been served with the Complaint and therefore did not need to take any action.*

(Emphasis added.) In defendant’s motion to set aside judgment, he alleges that he “did receive notice of the filing of a Lis Pendens against the property . . . and upon inquiry at the Buncombe County Clerk of Court Office, obtained a copy of the Complaint.”

Defendant’s own affidavit and motion unequivocally state that he had actual notice of the pending action. The trial court properly ruled that Rule 4(j4) precluded defendant from attacking the default judgment. The trial court did not abuse its discretion in denying defendant’s motion.

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Defendant further argues that the summons used for publication was ineffective since more than 30 days had passed since its issuance so it could not subject defendant to the jurisdiction of the court. We note that defendant did not raise this issue in his motion to set aside the judgment. The record does not reflect a ruling on this issue by the trial court. “A contention not raised in the trial court may not be raised for the first time on appeal.” *Town of Chapel Hill v. Burchette*, 100 N.C. App. 157, 159-60, 394 S.E.2d 698, 700 (1990); *see also* N.C.R. App. P. 10(b)(1) (2001).

Were the issue properly before us, we would still conclude that defendant’s argument is without merit. In *Whitley*, a summons was not served within 30 days and became dormant. *Whitley*, 72 N.C. App. at 159, 323 S.E.2d at 462. The plaintiff commenced service by publication 68 days after the issuance of the summons but did not obtain an endorsement or an alias and pluries summons to revive the dormant summons. *Id.* This Court stated “[s]ince it is clear that the plaintiff’s cause of action had not yet abated, we hold that service by publication could be had by the plaintiff without first having an alias or [sic] pluries summons issued.” *Id.*

Here, plaintiff’s alias and pluries summons was issued on 22 May 2000. This summons was returned unserved on 24 June 2000 and plaintiff commenced service by publication on 23 June 2000. Since the summons was not served within 30 days, it became dormant. Plaintiff commenced service by publication 32 days after the issuance of the summons. However, the plaintiff’s action would not be discontinued or abated until 90 days after the issuance of the summons. As in *Whitley*, the plaintiff here commenced service by publication after the summons became dormant but before the action had been discontinued. Therefore, “service by publication could be had by the plaintiff without first having an alias or [sic] pluries summons issued.” *Id.*

[2] Defendant next contends that the trial court erred by denying his motion to set aside the default judgment due to excusable neglect. Defendant argues that even though he was aware of the lawsuit, he “reasonably believed that he did not need to seek any legal guidance or worry about appearing in the matter” due to his discussions with Reep. Defendant contends that he was “a twenty-five year old man with a General Equivalency Diploma and no experience with legal matters,” that he had never been involved in a lawsuit and that he believed he had to be personally served by the sheriff’s department. We are not persuaded.

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“On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . excusable neglect” G.S. § 1A-1, Rule 60(b)(1) (2001). To set aside a judgment under Rule 60(b)(1), the moving party must show excusable neglect and a meritorious defense. *Grant v. Cox*, 106 N.C. App. 122, 125, 415 S.E.2d 378, 380 (1992). “A Rule 60(b) motion is addressed to the sound discretion of the trial court and its ruling will not be disturbed absent an abuse of that discretion.” *Gibson v. Mena*, 144 N.C. App. 125, 128, 548 S.E.2d 745, 747 (2001). However, “what constitutes ‘excusable neglect’ is a question of law which is fully reviewable on appeal.” *In re Hall*, 89 N.C. App. 685, 687, 366 S.E.2d 882, 884, *disc. review denied*, 322 N.C. 835, 371 S.E.2d 277 (1988). A trial court is not required to make written findings of fact when ruling on a Rule 60(b) motion, unless requested to do so by a party. *Gibson*, 144 N.C. App. at 128, 548 S.E.2d at 747. “Where the trial court does not make findings of fact in its order denying the motion to set aside the judgment, the question on appeal is ‘whether, on the evidence before it, the court could have made findings of fact sufficient to support its legal conclusion[.]’” *Grant*, 106 N.C. App. at 125, 415 S.E.2d at 380 (quoting *Financial Corp. v. Mann*, 36 N.C. App. 346, 349, 243 S.E.2d 904, 907 (1978)).

While there is no clear dividing line as to what falls within the confines of excusable neglect as grounds for the setting aside of a judgment, what constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case.

Thomas M. McInnis & Assoc., Inc. v. Hall, 318 N.C. 421, 425, 349 S.E.2d 552, 554-55 (1986). “Deliberate or willful conduct cannot constitute excusable neglect, nor does inadvertent conduct that does not demonstrate diligence.” *Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 103, 515 S.E.2d 30, 38, *aff’d*, 351 N.C. 92, 520 S.E.2d 785 (1999) (citations omitted).

This Court has previously held that the failure of a party to obtain an attorney is not excusable neglect. *See Hall*, 89 N.C. App. at 688-89, 366 S.E.2d at 885; *Moore v. City of Raleigh*, 135 N.C. App. 332, 336-37, 520 S.E.2d 133, 137 (1999), *disc. review denied*, 351 N.C. 358, 543 S.E.2d 131 (2000). In *Hall*, this Court stated:

A party may not show excusable neglect by merely establishing that she failed to obtain an attorney and was ignorant of

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the judicial process. Similarly, the fact that the movant claims he did not understand the case, or did not believe that the court would grant the relief requested in the complaint, has been held insufficient to show excusable neglect, even where the movant is not well educated.

Hall, 89 N.C. App. at 688, 366 S.E.2d at 885 (citations omitted). Further, “[e]xcusable neglect is not shown when a party fails to hire an attorney, even if he has never been involved in a lawsuit before and lacks knowledge of when his case will come up for trial.” *Moore*, 135 N.C. App. at 336-37, 520 S.E.2d at 137.

Here, our review is complicated by the lack of a transcript from the default judgment hearing and the Rule 60(b) motion hearing. However, the record does show that defendant was a twenty-five year old man with a General Equivalency Diploma. Defendant saw the Lis Pendens posted at the property which caused him to go to the Buncombe County Clerk of Court where he obtained a copy of the complaint. Defendant stated in his affidavit that he “did not seek any legal advice regarding the Complaint based upon [his] belief that [he] had not been served with the Complaint and therefore did not need to take any action.” Based on defendant’s knowledge of the action pending against him, we hold that defendant’s failure to obtain an attorney or seek legal advice is not excusable neglect. Due to defendant’s inability to show excusable neglect, the trial court did not abuse its discretion in denying defendant’s motion.

Whether defendant pled a meritorious defense is immaterial absent a showing of excusable neglect. *Hall*, 89 N.C. App. at 689, 366 S.E.2d at 885.

Accordingly, the decision of the trial court is affirmed.

Affirmed.

Judges WALKER and BIGGS concur.

IN RE SHAW

[152 N.C. App. 126 (2002)]

IN THE MATTER OF: SHANTA SHAW, DEANDREW BONEY, PRECIOUS BONEY

No. COA01-872

(Filed 6 August 2002)

1. Process and Service— service by publication—due diligence

The trial court did not err by concluding that service of process upon respondent father was proper under N.C.G.S. § 1A-1, Rule 4(j1) based on service by publication after defendant could not be found by a diligent effort, because: (1) petitioner satisfied Rule 4(j1) since an affidavit set forth the circumstances warranting the use of service by publication; and (2) respondent has not included in the record or his brief any indication as to his whereabouts during the time in question, or any argument as to how petitioner could have located him using due diligence.

2. Child Abuse and Neglect— stipulation of neglect—no evidentiary hearing

The trial court erred by entering a juvenile neglect adjudication in the absence of respondent father based upon the mother's stipulation of neglect without conducting an evidentiary hearing, because: (1) N.C.G.S. § 7B-902 states that all parties must be present in order for the trial court to enter a consent judgment; and (2) respondent father was not present, and therefore, no valid consent judgment could be entered.

Judge GREENE dissenting.

Appeal by respondent father from order filed 21 January 1999 by Judge Edward A. Pone in Cumberland County District Court. Heard in the Court of Appeals 23 April 2002.

Staff Attorneys John F. Campbell and David Kennedy for petitioner-appellee Cumberland County Department of Social Services.

Hatley & Stone, P.A., by Michael A. Stone, for respondent-appellant Wesley Turner, Jr.

Deborah Koenig for guardian ad litem.

HUNTER, Judge.

Wesley Turner, Jr. ("respondent") appeals an adjudication and disposition order entered 21 January 1999 adjudicating his daughter

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Shanta Shaw ("Shanta") a neglected juvenile and awarding custody to Thelma Mae Boney ("Ms. Boney"). We reverse and remand.

On 14 April 1998, the Cumberland County Department of Social Services ("petitioner") filed a petition alleging that Shanta was an abused and neglected juvenile.¹ The petition states that respondent's last known address at the time was "6519 Acus Court, Fayetteville, NC." A summons was issued to and personally served (along with the petition) upon Shanta's mother. Although a summons was issued in respondent's name, the trial court found that his "whereabouts [were] unknown" and, pursuant to N.C. Gen. Stat. § 7B-407 (2001), directed service be had on him "through publication." Before service by publication was attempted, the trial court entered a temporary order on 22 May 1998 granting nonsecure custody to Ms. Boney. Following service by publication in "The Fayetteville Observer" on 6 June, 13 June, and 20 June 1998, petitioner filed an "Affidavit of Service by Publication" in the Cumberland County Clerk's office on 8 July 1998 stating that respondent's "address, whereabouts, dwelling house or usual place of abode . . . [was] unknown, and [could not] with due diligence be ascertained" and that respondent "is a transient person with no permanent residence."

On 11 January 1999, the abuse and neglect petition was heard before the trial court. At this time, the trial court found that Shanta's mother and respondent had been properly served with process. Shanta's mother was in court and represented by counsel. Respondent was not in court and was not represented by counsel. Shanta's mother stipulated to a finding of neglect, and, based upon that stipulation (and without hearing any evidence), the trial court, in an order entered 21 January 1999, adjudicated Shanta a neglected juvenile and awarded custody of Shanta to Ms. Boney. Petitioner voluntarily dismissed the abuse allegation.

On 8 February 2001, respondent appeared in court at a permanency planning review hearing and orally challenged (1) the validity of his service by publication, and (2) the validity of the adjudication of neglect on the grounds that respondent was not present at the hearing. The trial court apparently treated respondent's argument as tantamount to a motion to set aside the adjudication and denied the motion. Respondent appeals.

1. The petition also lists two juveniles who are children of Shanta's mother (Lisa Relliford Boney) but whose father is Larry Boney. This opinion involves only the trial court's adjudication and disposition order as it relates to Shanta.

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On appeal, the issues are: (1) whether the service of process upon respondent was proper; and (2) whether the trial court erred by entering a neglect adjudication based upon the mother's stipulation of neglect without conducting an evidentiary hearing.

I.

[1] Service by publication is a permitted method of service of process where a party "cannot with due diligence be served by personal delivery, registered or certified mail, or . . . pursuant to 26 U.S.C. § 7502(f)(2)." N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2001) ("Rule 4(j1)"). Rule 4(j1) requires that "[u]pon completion of such service there shall be filed with the court an affidavit showing . . . the circumstances warranting the use of service by publication." *Id.*

In *County of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 323 S.E.2d 458 (1984), the plaintiff filed an affidavit stating only that the defendant had been served by publication according to the statute, but not setting forth any circumstances warranting the use of service by publication as expressly required by Rule 4(j1). *Id.* at 157, 323 S.E.2d at 460. Thus, the Court held that "the affidavit does not state the circumstances warranting the use of service by publication as required by Rule 4. The affidavit does not allege any facts showing that the defendant with due diligence could not be personally served." *Id.* at 160-61, 323 S.E.2d at 463. The *Whitley* Court did not augment the requirements under Rule 4(j1); rather, the Court simply held that Rule 4(j1) requires more than the mere conclusory assertion that service has been accomplished through publication.

Here, petitioner attempted to serve a summons and notice of hearing upon respondent at his last known address in Fayetteville. The summons was received by the Sheriff in Cumberland County on 18 April 1998 and was returned on 28 May 1998 with the Sheriff's certification that respondent could not be found by a diligent effort. Upon completion of service of process by publication, petitioner filed an "Affidavit of Service by Publication" stating: "That service by publication was necessary because: The address, whereabouts, dwelling house or usual place of abode of the Respondent is unknown, and cannot with due diligence be ascertained; [and because t]he Respondent is a transient person with no permanent residence." The trial court found that all parties to the action had been properly served. We hold that petitioner satisfied Rule 4(j1) because, unlike the affidavit in *Whitley*, the affidavit here sets forth "the circumstances warranting the use of service by publication," which is all that

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is required by Rule 4(j1). We further note that respondent has not included in the record or his brief any indication as to his whereabouts during the time in question, or any argument as to how petitioner could have located him using due diligence.

II.

[2] In addition to challenging the service of process, respondent challenges the trial court's authority to enter an adjudication of neglect without an evidentiary hearing. Section 7B-802 of our General Statutes requires an adjudicatory hearing to determine the existence or nonexistence of the conditions alleged in a petition. N.C. Gen. Stat. § 7B-802 (2001); see *Thrift v. Buncombe County DSS*, 137 N.C. App. 559, 562, 528 S.E.2d 394, 396 (2000). That statute further mandates that "[i]n the adjudicatory hearing, the court shall protect the rights of the juvenile and the juvenile's parent to assure due process of law." N.C. Gen. Stat. § 7B-802. In an adjudicatory hearing to determine abuse, neglect, or dependency, the petitioner must prove the allegations "by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2001).

An adjudication of abuse, neglect or dependency in the absence of an adjudicatory hearing is permitted only in very limited circumstances.

Nothing in this Article precludes the court from entering a consent order or judgment on a petition for abuse, neglect, or dependency when all parties are present, the juvenile is represented by counsel, and all other parties are either represented by counsel or have waived counsel, and sufficient findings of fact are made by the court.

N.C. Gen. Stat. § 7B-902 (2001). Aside from a consent order or judgment under these circumstances, "a default judgment or judgment on the pleadings is inappropriate in a proceeding involving termination of parental rights, [and] is equally inappropriate in an adjudication of neglect." *Thrift*, 137 N.C. App. at 563, 528 S.E.2d at 396 (noting that adjudication of neglect constitutes grounds for terminating parental rights and is frequently the basis for a termination proceeding). This Court in *Thrift* explained why an adjudicatory hearing is generally required in this context: "As the link between a parent and child is a fundamental right worthy of the highest degree of scrutiny, the trial court must fulfill all procedural requirements in the course of its duty to determine whether allegations of neglect are supported by clear and convincing evidence." *Id.* (citation omitted).

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In the absence of respondent's presence, the consent of Shanta's mother to the adjudication of neglect in this case was insufficient to dispense with the requirement of an adjudicatory hearing. "According to the mandates of [N.C. Gen. Stat. § 7B-902], all parties must be present in order for the trial court to enter a consent judgment. In the case at bar, respondent was not present and, as such, no valid consent judgment could be entered." *Id.* at 563, 528 S.E.2d at 397.

For the reasons stated herein, although we hold that service of process was proper based on Rule 4(j1), we hold that the trial court erred in finding the allegations of neglect contained in the petition were proven by clear and convincing evidence. The judgment of the trial court is therefore reversed and the matter is remanded for an adjudicatory hearing.

Reversed and remanded.

Judge TIMMONS-GOODSON concurs.

Judge GREENE dissents in a separate opinion.

GREENE, Judge, dissenting.

As I disagree with the majority regarding the validity of service of process by publication on respondent, I dissent. While I do agree with the majority as to part II of its opinion, I do not reach this issue in my analysis.

The pertinent issues in this case are whether: (I) petitioner's 8 July 1998 affidavit is sufficient to support service by publication on respondent; and if not, (II) the trial court has the authority to enter a neglect adjudication when a summons has not been served upon one of the parents of a juvenile alleged to be neglected.

I

Service by publication is a permitted method of service of process if the whereabouts of the party sought to be served are unknown and that party "cannot with due diligence be served by personal delivery, registered or certified mail, or . . . pursuant to 26 U.S.C. § 7502(f)(2)." N.C.G.S. § 1A-1, Rule 4(j1) (2001). Furthermore, upon completion of the newspaper publication, "there shall be filed with the [trial] court an affidavit showing . . . the circumstances warranting the use of service by publication, and information, if any,

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regarding the location of the party served.”² *Id.* Strictly construed, see *Sink v. Easter*, 284 N.C. 555, 560, 202 S.E.2d 138, 142 (1974) (service by publication statute must be strictly construed), the statute requires the affidavit to “set forth the steps taken, although unsuccessful, to locate [the respondent],” 1 G. Gray Wilson, *North Carolina Civil Procedure* § 4-22, at 69 (2d ed. 1995); see *County of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 161, 323 S.E.2d 458, 463 (1984) (affidavit must include “facts showing that the defendant with due diligence could not be personally served”).

In this case, the 8 July 1998 post-publication affidavit filed by petitioner asserts “service by publication was necessary” because respondent’s “address, whereabouts, dwelling house or usual place of abode . . . [was] unknown, and [could not] with due diligence be ascertained” and because he “[was] a transient person with no permanent residence.” These assertions are nothing more than ultimate facts; they do not reveal the steps taken by petitioner to locate and personally serve respondent; and they are insufficient as a matter of law to support service by publication on respondent.³

II

Petitioner argues in the alternative that the orders entered by the trial court are nonetheless valid because service on one parent is sufficient to vest the trial court with the authority to proceed with the neglect adjudication and disposition of a juvenile, and in this case, personal service was had on the mother. For the reasons given in *In re Poole*, 151 N.C. App. 472, — S.E.2d —, COA01-871 (July 16, 2002), I disagree. Service of process on the mother in this neglect proceeding, without service on respondent, Shanta’s father, is insufficient to vest authority in the trial court to enter an adjudication of neglect or any dispositional order based on that adjudication. Accordingly, the 21 January 1999 adjudication and disposition order and any subsequent dispositional orders should be vacated as they relate to Shanta.

2. The authorization of service by publication by the trial court pursuant to section 7B-407 does not relieve the party seeking service by publication from the requirements of Rule 4(j1).

3. If the required affidavit does set out the circumstances warranting service by publication, a party may nonetheless challenge the validity of service of process and, after having done so, is entitled to an evidentiary hearing in which the other party must present evidence of due diligence in support of the service by publication. See *Coble v. Brown*, 1 N.C. App. 1, 7, 159 S.E.2d 259, 264 (1968).

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KEITH ALEXANDER RAGLAND, PLAINTIFF V. DAVID LEE HARRIS, DEFENDANT

No. COA01-1124

(Filed 6 August 2002)

**Workers' Compensation— jurisdiction—automobile accident
in workplace parking lot**

The trial court correctly dismissed plaintiffs' negligence action where plaintiff was injured in an automobile accident in a parking lot after work and his remedy falls within the exclusivity provisions of the Workers' Compensation Act. The evidence was that plaintiff's conduct after his shift ended was devoted exclusively to looking for a ride home and then waiting for that ride to materialize. The fact that other alternatives existed does not render plaintiff's conduct unreasonable by itself.

Appeal by plaintiff from order entered 27 November 2000 by Judge Orlando F. Hudson, Jr. in Vance County Superior Court. Heard in the Court of Appeals 6 June 2002.

Harvey D. Jackson for plaintiff-appellant.

Bailey & Dixon, L.L.P., by Dayatra T. King, for defendant-appellee.

CAMPBELL, Judge.

On 21 July 1998, plaintiff filed the instant action in Vance County Superior Court alleging that defendant's negligent operation of an automobile in which plaintiff was a passenger caused an accident that resulted in injuries to plaintiff. On 3 August 1998, the summons and a copy of the complaint were returned unserved on defendant, for the stated reason that defendant no longer lived at the address indicated on the summons. On or about 17 August 1998, Nationwide Mutual Insurance Company ("Nationwide") appeared on behalf of the allegedly uninsured defendant and filed a motion to dismiss plaintiff's action on the grounds of insufficiency of process, insufficiency of service of process, and lack of personal jurisdiction. The record does not contain a ruling on this motion. On 15 March 1999, Nationwide filed a motion for summary judgment, which was withdrawn on 27 April 1999. On 16 October 2000, Nationwide filed an answer admitting defendant's negligence but denying that his negligence resulted in the injuries allegedly received by

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plaintiff. Nationwide also moved to dismiss the action for lack of subject matter jurisdiction based on the exclusivity provisions of the North Carolina Workers' Compensation Act. *See* N.C. Gen. Stat. § 97-10.1 (2001). The case was tried at the 30 October 2000 Civil Session of Vance County Superior Court.

Plaintiff's evidence at trial tended to show that he and defendant were co-workers at Southern Quilters, a manufacturer of pillowcases and bed comforters. On the morning of 22 November 1996, plaintiff's work shift ended earlier than scheduled. Plaintiff asked defendant for a ride home. Defendant responded that he could give plaintiff a ride home but that he had "some business to take care of" before they left. Plaintiff then waited in the break room for defendant for approximately twenty to twenty-five minutes. Thinking defendant had left, plaintiff went outside to the parking lot, which was owned and operated by Southern Quilters, to find another ride home. Plaintiff saw defendant in the parking lot speaking with another fellow employee. After defendant finished his conversation, he approached plaintiff and the two of them got into defendant's car. Defendant then drove his car into the vehicle being operated by the individual with whom he had just been talking. Plaintiff testified that he sustained injuries to his neck and back in the collision and that his injuries resulted in medical expenses, loss of income and other related damages.

At the close of plaintiff's evidence, Nationwide moved for a directed verdict on the grounds that plaintiff's evidence demonstrated as a matter of law that his action against defendant was barred by the exclusivity provisions of the Workers' Compensation Act ("the Act") and therefore the trial court lacked subject matter jurisdiction over the action. The trial court agreed and dismissed plaintiff's action due to a lack of subject matter jurisdiction. Plaintiff appeals.

The sole issue on appeal is whether the trial court erred in dismissing the action for a lack of subject matter jurisdiction based on the exclusivity provisions of the Act. For the following reasons, we affirm the trial court's dismissal of plaintiff's action.

"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." N.C. R. Civ. P. 12(h)(3) (2001). Thus, "[a]n objection to subject matter jurisdiction may be made at any time during the course of the action." *Vance Construction Co. v. Duane White Land Corp.*, 127 N.C. App. 493, 494, 490 S.E.2d 588, 589 (1997).

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For an injury to be compensable under the Act, the employee must show that the injury was caused by an accident arising out of and in the course of the employment. N.C. Gen. Stat. § 97-2(6) (2001); *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). Injuries incurred by an employee in the course of employment due to the negligence of a co-employee fall within the provisions of the Act. *Pleasant v. Johnson*, 312 N.C. 710, 713, 325 S.E.2d 244, 247 (1985). "[T]he rights granted an injured employee under the Act are the exclusive remedy in the event of the employee's injury by accident in connection with the employment." *Reece v. Forga*, 138 N.C. App. 703, 705, 531 S.E.2d 881, 883 (2000); N.C. Gen. Stat. § 97-10.1. The exclusive jurisdiction of such cases is statutorily conferred upon the Industrial Commission. *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 350 S.E.2d 83 (1986). Therefore, an employee who sustains an injury by accident arising out of and in the course of employment cannot maintain a common law action against a co-employee whose negligence caused the injury. *Pleasant*, 312 N.C. at 713, 325 S.E.2d at 247.

Within the meaning of the Act, an accident is an " 'unlooked for and untoward event which is not expected or designed by the person who suffers the injury.' " *Adams v. Burlington Industries, Inc.*, 61 N.C. App. 258, 260, 300 S.E.2d 455, 456 (1983) (citation omitted). It is clear that the alleged injuries sustained by plaintiff in the automobile collision in the instant case are injuries by accident within the purview of the Act. The remaining inquiry is whether the accident was one arising out of and in the course of plaintiff's employment.

"The phrases 'arising out of' and 'in the course of' one's employment are not synonymous but rather are two separate and distinct elements both of which a claimant must prove to bring a case within the Act." *Gallimore*, 292 N.C. at 402, 233 S.E.2d at 531. "In general, the term 'in the course of' refers to the time, place and circumstances under which an accident occurs, while the term 'arising out of' refers to the origin or causal connection of the accidental injury to the employment." *Id.* As a general rule, "an injury by accident occurring while an employee travels to and from work is not one that arises out of or in the course of employment." *Royster v. Culp, Inc.*, 343 N.C. 279, 281, 470 S.E.2d 30, 31 (1996). However, "[a] limited exception to the 'coming and going' rule applies when an employee is injured when

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going to or coming from work but is on the employer's premises." *Id.*¹ "[I]njuries sustained by an employee while going to and from his place of work upon the premises owned or controlled by his employer are generally deemed to have arisen out of and in the course of the employment within the meaning of the Workmen's Compensation Acts and are compensable provided the employee's act involves no unreasonable delay." *Maurer v. Salem Co.*, 266 N.C. 381, 382, 146 S.E.2d 432, 433-34 (1966) (quoting *Bass v. Mecklenburg County*, 258 N.C. 226, 232, 128 S.E.2d 570, 574 (1962)).

In *Maurer*, an employee ("Maurer") had arranged to ride home after work with one of his fellow employees ("Caudle"). At the end of the workday, Maurer and Caudle went to Caudle's car, which was located in the employer's parking lot. The car would not start and the two of them spent approximately twenty to twenty-five minutes attempting to get the engine started. Finally, they released the brakes and attempted to start the engine by pushing the vehicle. During this attempt, the forward movement of the vehicle caught and injured Maurer. As a result, Maurer filed a claim for compensation with the North Carolina Industrial Commission ("the Commission"). The Commission concluded that Maurer had suffered an injury by accident arising out of and in the course of his employment and awarded compensation. On appeal, the Supreme Court concluded that the delay between the time Maurer left the employer's plant and the time Maurer was injured was not unreasonable because it was "devoted exclusively to their efforts to start the vehicle," in an attempt to leave the employer's premises. *Id.* at 382, 146 S.E.2d at 433. Thus, the Court held that Maurer's injury fell "within the exception to the general rule that injuries in travel to and from work are not compensable." *Id.*

In *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E.2d 47 (1968), the plaintiff was injured in an accident in the parking lot owned and maintained by her employer. The accident was caused by the negligence of the plaintiff's co-employee while both parties were in vehicles that were leaving the employer's premises during a lunch break. This Court set forth the law on the subject as follows:

With respect to *time*, the course of employment begins a reasonable time before actual work begins, and continues for a

1. "It is usually held that an injury on a parking lot owned or maintained by the employer for his employees is an injury on the employer's premises." *Maurer v. Salem Co.*, 266 N.C. 381, 382-83, 146 S.E.2d 432, 434 (1966). In the instant case, the parties do not dispute that the parking lot in which the accident at issue occurred was owned and controlled by the employer for the benefit of its employees.

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reasonable time after work ends, and includes intervals during the work day for rest and refreshment With respect to *circumstances*, injuries within the course of employment include those sustained while 'the employee is doing what a man so employed may reasonably do within a time which he is employed and at a place where he may reasonably be during that time to do that thing.' . . . And an employee may be in the course of his employment when he is on the way to the place of his duties, leaving the place of his duties at the end of the day, or leaving upon learning that there was no work for him to do.

Harless, 1 N.C. App. at 456, 162 S.E.2d at 52-53 (emphasis in original) (internal citations omitted). The Court then concluded that the plaintiff was injured during the course of her employment since leaving the employer's premises during lunch was an activity permitted by the employer and one in which other employees customarily participated. In addition, the Court concluded that the plaintiff's injury was attributable to the heightened risk present when large numbers of employees were attempting to leave the employer's parking lot. Accordingly, the Court held that the plaintiff's injuries arose out of and in the course of her employment, thus barring the plaintiff's common law action against the defendant.

In the instant case, plaintiff was allowed to leave his place of employment early because there was no work for him to do. As a result, plaintiff was without a ride home. Plaintiff successfully secured a ride home from defendant, but was told that he would have to wait for defendant to "finish up some business." Plaintiff waited in the break room for defendant for twenty to twenty-five minutes, then proceeded out to the parking lot, where he waited for defendant for a few more minutes while defendant finished a conversation with another fellow employee. In sum, the evidence tends to show that plaintiff waited for a ride for approximately thirty minutes after his work shift ended. However, under the decisions in *Maurer* and *Harless*, it is clear that the length of time between an employee getting off work and the employee leaving the employer's premises is not the determinative factor. Rather, the conduct of the employee during the delay must be judged to determine whether "the employee [was] doing what a man so employed may reasonably do[.]" *Harless*, 1 N.C. App. at 456, 162 S.E.2d at 53. Here, the evidence shows that plaintiff's conduct after his work shift ended was devoted exclusively to looking for a ride home and then waiting for that ride to materialize. There is no evidence that plaintiff's decision to wait for defendant was

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unreasonable. The fact that other alternatives may have existed that would have reduced plaintiff's delay in leaving the employer's premises, such as asking another fellow employee for a ride or calling his normal ride to inform them he was ready, does not by itself render plaintiff's conduct unreasonable. Under the facts and circumstances of this case, we find that plaintiff acted as "a man so employed may reasonably" act in his efforts to leave his place of employment following his work shift. *Id.* Therefore, we conclude that plaintiff's alleged injuries arose out of and in the course of his employment. Accordingly, plaintiff's remedy falls within the exclusivity provisions of the Workers' Compensation Act, with jurisdiction statutorily conferred upon the Industrial Commission, and plaintiff may not maintain this common law action against defendant. Thus, we affirm the trial court's dismissal of plaintiff's action.

Affirmed.

Judges MARTIN and TIMMONS-GOODSON concur.

NATIONWIDE MUTUAL INSURANCE COMPANY, PLAINTIFF v. SONDR A. HAIGHT
AND JIMMIE F. MILLS, ADMINISTRATOR OF THE ESTATE OF JAMES ROBERT SCOTT HAIGHT,
DEFENDANTS

No. COA01-1056

(Filed 6 August 2002)

Insurance— UIM—multiple claimants—calculation of combined single limit

In a declaratory judgment action brought by an insurance company to determine underinsured motorist coverage for injuries arising from an automobile accident, both policy and statute require calculation of the difference between the "combined single limit" under the policy (\$500,000) and the total actually paid by the liability carrier (\$200,000), with the result (\$300,000) paid to the defendants on a pro rata basis. The policy here did not set per-person and per accident limits and the UIM policy's "combined single limit" more nearly resembles a per accident limit. Moreover, the purpose of uninsured and underinsured motorist insurance is the same, and applying the UIM limit indi-

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vidually would result in an inconsistent recovery because the offset from the tortfeasor's liability policy would only be available in UIM cases.

Appeal by plaintiff from declaratory judgment entered 5 June 2001 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 June 2002.

Baucom, Claytor, Benton, Morgan & Wood, P.A., by Rex C. Morgan and Jason James, for plaintiff-appellant.

Weaver, Bennett & Bland, P.A., by Michael David Bland, Benjamin L. Worley, and Roderick Ventura, for defendant-appellees.

HUDSON, Judge.

Nationwide Mutual Insurance Company ("Nationwide") appeals from a declaratory judgment ordering it to pay defendants \$300,000 in underinsured motorist ("UIM") coverage. For the reasons given below, we reverse and remand to the superior court for entry of a new order consistent with this opinion.

On 7 July 1996, a vehicle driven by Charles Weston Holleman failed to yield the right of way to a vehicle driven by Sondra A. Haight ("defendant Haight"), resulting in a collision. The vehicle driven by defendant Haight contained three passengers: Michael David Grant Haight, James Robert Scott Haight, and Ian McPherson. All of the occupants of defendant Haight's vehicle were injured, and James Robert Scott Haight died as a result of his injuries. Jimmie F. Mills is the Administrator of the Estate of James Robert Scott Haight (the "Estate").

At the time of the collision, Holleman's vehicle was insured by Aetna Casualty and Surety Company ("Aetna"), under a policy providing liability coverage with limits of \$100,000 per person and \$300,000 per accident. Defendant Haight's vehicle was insured by Nationwide, under a policy providing UIM coverage with a "combined single limit" of \$500,000.

All of the occupants of defendant Haight's vehicle filed complaints seeking damages for personal injuries resulting from Holleman's negligence. Aetna paid \$100,000 each from its liability coverage to settle the claims by defendant Haight and the Estate (collectively, "defendants"), and it paid \$74,476.64 to settle

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the claim by Ian McPherson. Michael David Grant Haight's claim has not been settled by Aetna.

After accepting \$100,000 each from Aetna, defendants made claims for UIM coverage pursuant to the Nationwide policy. The parties submitted their claims to an arbitrator, who awarded damages in the amount of \$225,000 to the Estate and in the amount of \$525,000 to defendant Haight. A dispute then arose between the parties regarding the amount of UIM coverage available to defendants under the policy.

On 13 September 2000, Nationwide tendered \$200,000 to defendants pursuant to the UIM coverage. On 19 September 2000, Nationwide filed a declaratory judgment action, asking the trial court to declare that the total amount of UIM coverage available to defendants was the \$200,000 Nationwide had already tendered, and that Nationwide had fulfilled all of its obligations under the policy.

The trial court concluded the following:

1. That the total amount of Under-insured Motorist Coverage available under Nationwide's policy to all claimants is \$500,000 per accident.
2. That the total amount of under-insured coverage available to Sondra Haight under the Nationwide Policy, after giving credit for the \$100,000 payment she received from Aetna's liability policy, is \$400,000.
3. That the total amount of under-insured coverage available to the Estate of James Robert Scott Haight under the Nationwide Policy, after giving a credit for the \$100,000 payment it received from Aetna's liability policy is \$400,000.

The court found that Nationwide was "obligated to pay to the Defendants the unpaid balance of the \$500,000 Under-Insured Motorist Coverage under its policy." Taking into account the \$200,000 Nationwide had already tendered, the court then ordered that "[t]he amount of \$300,000 should be paid to Defendants and pro-rated between the Defendants based on the amount of each Defendant's UIM claim and the total amount of UIM coverage available under Nationwide's Policy." Nationwide appeals.

Nationwide argues that the trial court incorrectly calculated the amount of coverage available under the UIM policy. First, Nationwide argues that the trial court should have deducted the amount consti-

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tuting the per-accident limit of the tortfeasor's liability policy (\$300,000) from the UIM limit of \$500,000, contending that this amount will be paid once all the claims are settled. Thus, Nationwide asserts, it is liable only for an amount of \$200,000, the amount it has already tendered to defendants. Defendants dispute the contention that the liability policy's per-accident limit will be exhausted.

In the alternative, Nationwide argues that \$274,476.64, the amount paid to all claimants so far by the tortfeasor's liability policy, should be deducted from the \$500,000 UIM limit. Thus, Nationwide asserts, it is liable for the amount of \$225,523.36. Since Nationwide has already tendered \$200,000 to defendants, it contends under this approach that it should be ordered to pay only \$25,523.36.

And finally, Nationwide contends that the minimum amount that should be deducted from the \$500,000 UIM limit is \$200,000, the amount paid by the liability policy to the two defendants. Thus, Nationwide argues that under no circumstances should it be required to pay a total of more than \$300,000 in UIM proceeds. Defendants, on the other hand, maintain that the trial court's method of calculation was correct.

UIM insurance is governed by N.C. Gen. Stat. § 20-279.21(b)(4) (2001), which provides in relevant part that "the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident." We agree with defendants' contention that use of the singular "claimant" suggests that a separate calculation should be performed for each claimant. Therefore, we reject Nationwide's contention that the amount of UIM coverage should have been offset by either \$300,000 (the per-accident limit of the tortfeasor's liability insurance, which Nationwide speculates will be exhausted once all four claimants have settled) or \$274,476.64 (the total amount paid out so far by the tortfeasor's liability insurer to three claimants).

However, we disagree with defendants that the trial court's calculation was correct. It appears that the trial court performed a separate calculation for each defendant, subtracting \$100,000 (the amount each defendant received from the liability policy) each time from \$500,000, the "combined single limit" of UIM coverage in the policy. Because the Nationwide policy sets only one "combined single

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limit” of \$500,000 on its UIM coverage, rather than a per-person limit, we do not believe this method of computing the offset is consistent with the statute as applied to this policy.

The policy defines an “uninsured motor vehicle” to include an “underinsured motor vehicle.” The policy contains the following endorsement pertaining to uninsured motorists coverage:

D. LIMIT OF INSURANCE

1. Regardless of the number of covered “autos,” “insureds,” premium paid, claims made or vehicles involved in the “accident,” the most we will pay for all damages resulting from any one “accident” is the limit of UNINSURED MOTORISTS COVERAGE shown in the declarations.

The policy provides for an “uninsured motorists coverage combined single limit” of \$500,000 and an “underinsured motorists coverage combined single limit” of \$500,000. Thus, it is clear that under this policy there is only one limit on UIM coverage, in the amount of \$500,000, and that this is the maximum amount of UIM coverage for any one accident.

Emphasizing the use in the statute of the singular “claim” and “claimant,” defendants argue that a separate calculation must be performed for each claimant, and that \$500,000 is the correct amount to be used as “the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident.” N.C.G.S. § 20-279.21(b)(4). Defendants contend that *North Carolina Farm Bureau Mutual Insurance Co. v. Gurley*, 139 N.C. App. 178, 532 S.E.2d 846, *disc. review denied*, 352 N.C. 675, 545 S.E.2d 427 (2000), is dispositive of the issue, and that under *Gurley*, the superior court’s calculation was correct. However, *Gurley* does not address the issue we face here. The UIM policy in *Gurley* contained both a per-person and a per-accident limit. At issue was whether the per-person or the per-accident limit in the UIM policy should be used in determining the amount of UIM coverage “applicable to the motor vehicle involved in the accident.” *See id.* at 179, 532 S.E.2d at 847 (“Specifically, we address whether the applicable limit of coverage under [the UIM statute] is the UIM carrier’s per-person or per-accident limit.”). We held:

when the negligent driver’s liability policy was exhausted pursuant to the per-person cap, the UIM policy’s per-person cap will be the applicable limit. However, when the liability policy was

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exhausted pursuant to the per-accident cap, the applicable UIM limit will be the UIM policy's per-accident limit.

Id. at 181, 532 S.E.2d at 849.

The UIM policy at issue here does not set two limits, and so the holding of *Gurley* does not necessarily compel the result defendants seek. In fact, the analysis in *Gurley* supports our result here. As we explained in *Gurley*, when the liability policy is exhausted pursuant to the per-accident limit, then the proper calculation of UIM coverage available is obtained by subtracting the per-accident limit of the tortfeasor's liability policy from the per-accident limit of the UIM policy. *See id.* at 182, 532 S.E.2d at 849. Thus, in such a case, despite the language of the statute, only one calculation is performed for all claimants combined. Here, the liability policy was exhausted pursuant to the per-person limit for these defendants, and we must decide how to offset those payments from the UIM "combined single limit," which more nearly resembles a per-accident limit.

Although the statutory language may be susceptible to the interpretation adopted by the trial court, we do not believe that interpretation reflects the purpose of the statute. " 'UIM coverage is intended to place a policy holder in the *same position* that the policy holder would have been in if the tortfeasor had had liability coverage equal to the amount of the UM/UIM coverage.' " *Id.* at 183, 532 S.E.2d at 849-50 (quoting *Mutual of Enumclaw Ins. Co. v. Key*, 883 P.2d 875, 877 (Or. Ct. App. 1994)). If we agreed to apply the \$500,000 UIM limit to each claimant individually, as the trial court did, these claimants would receive more in total insurance coverage than if the same claimants had been injured by an uninsured motorist. This is inconsistent with the statutory provisions. We note that where the UM and UIM limits are the same, the insurer will pay less on an underinsured claim, because of the offset from the tortfeasor's liability policy, than it will pay on an uninsured claim, where there are no proceeds to deduct.

For example, in this case, the superior court, using this method of calculation, applied a limit of \$400,000 of UIM coverage to each defendant separately (the \$500,000 limit on the UIM coverage less the \$100,000 paid by the tortfeasor's policy). Thus, the court determined that defendant Haight should receive \$400,000 of UIM coverage, since the damages left uncompensated by exhaustion of the tortfeasor's liability policy were in the amount of \$425,000 (capped by the \$400,000 limit); and the court determined that the Estate should receive

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\$125,000, the amount of damages left uncompensated by exhaustion of the tortfeasor's liability policy. However, because the "combined single limit" of the UIM policy is \$500,000, the court concluded that defendants should share \$500,000 *pro rata*. Having already received a total of \$200,000 from the tortfeasor's liability policy, under the superior court's analysis, the defendants would receive a total of \$700,000 in insurance benefits.

On the other hand, if defendants had been injured by an uninsured motorist, they would have received no payment from a liability policy, and thus, there would have been no reason to perform two calculations. Each defendant would simply receive a *pro rata* share of \$500,000. Hence, under the superior court's reasoning, defendants would receive an additional \$200,000 of insurance coverage because of the collision with the underinsured motorist (Holleman), beyond what they would have received if Holleman had not been insured at all. Since we have stated that "the purpose of [uninsured motorist] and UIM insurance is the same," we do not believe the legislature intended such a result. *Id.* at 182-83, 532 S.E.2d at 849 (characterizing such a discrepancy as a "windfall" unintended by the legislature).

We believe that the statute and policy here require that we calculate the difference between the "combined single limit" of \$500,000 under the UIM policy and the combined total actually paid to these two defendants by the liability carrier. Thus, the amount of UIM coverage available to defendants is \$500,000 less \$200,000, resulting in \$300,000 to be shared on a *pro rata* basis.

Under this reasoning, the trial court should have concluded that Nationwide was liable for a payment of \$300,000. Because Nationwide has already tendered \$200,000, the trial court should have ordered Nationwide to pay an additional \$100,000 to defendants, with the \$300,000 total to be shared on a *pro rata* basis. Accordingly, we reverse the trial court's order and remand for entry of a new order in accordance with this opinion.

Reversed and remanded.

Judges GREENE and BIGGS concur.

ANTHONY v. CITY OF SHELBY

[152 N.C. App. 144 (2002)]

TED ANTHONY, CLINE W. BORDERS, AND WIFE, DORIS B. BORDERS, ARNEITHA BROOKS, ROBERT G. CARNEY, AND WIFE, WILMA J. CARNEY, WILLIAM CARTER, AND WIFE, SHIRLEY M. CARTER, ROBERT ROY FRANCIS, AND WIFE, IRIS F. FRANCIS, JOHN T. GOLD, AND WIFE, ANN C. GOLD, JACKIE W. HAWK, GERALDINE M. HAWK, THOMAS M. HAWK, MAXINE HAYNES, JASMINE HOPPER, LATONIA HOPPER, BOBBY R. HORTON, SR. AND WIFE, RUTH V. HORTON, VINCENT HUSKEY, AND WIFE, ROBIN HUSKEY, RODNEY M. MCGEE, AND WIFE, PEGGY ANN MCGEE, PETITIONERS V. CITY OF SHELBY, AND MICHAEL DALE PHILBECK (MAYOR), KEVIN KIRK ALLEN, BETSY HUDDLE FONVIELLE, ROBERT STILL, RALPH LANE GILBERT, III, ANDREW LEONARD HOPPER, SR., AND SAMUEL A. RAPER, IN THEIR CAPACITY AS MEMBERS OF THE COUNCIL OF THE CITY OF SHELBY, RESPONDENTS

No. COA01-1164

(Filed 6 August 2002)

Cities and Towns— annexation ordinances—identification of area—connection by street rights-of-way—public informational meeting

The trial court did not err by affirming annexation ordinances adopted by respondent city on 20 April 2000, because: (1) the city substantially complied with N.C.G.S. § 160A-49(i) requiring that the resolution identify the area as being under consideration for annexation; (2) petitioners failed to carry their burden of showing noncompliance with N.C.G.S. § 160A-48(b) requiring each of the areas to be connected to other portions by street rights-of-way; and (3) the public informational meeting was held in substantial compliance with N.C.G.S. § 160A-49(c1) since all persons attending the meeting were given the opportunity to ask one or more questions to which the city representatives responded.

Appeal by petitioners from order entered 21 March 2001 by Judge Timothy L. Patti in Cleveland County Superior Court. Heard in the Court of Appeals 6 June 2002.

Deaton & Biggers, P.L.L.C., by W. Robinson Deaton, Jr., and Brian D. Gulden, for petitioner-appellants.

The Brough Law Firm, by Michael B. Brough, for respondent-appellee City of Shelby.

MARTIN, Judge.

Petitioners appeal the trial court's order affirming five annexation ordinances adopted by respondent City of Shelby (here-

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inafter “the City”) on 20 April 2000. For reasons set forth herein, we affirm.

Briefly summarized, the record discloses that on 7 December 1998, the Shelby City Council adopted “A Resolution of Consideration for Future Annexation Actions by the City of Shelby.” In this resolution, the area identified as the area of consideration for purposes of annexation planning was “ ‘Cleveland County (Shelby) Township No. 6.’ ” Subsequently, on 7 February 2000, the Shelby City Council approved and adopted resolutions of intent to extend the corporate limits which pertained to five separate proposed annexation areas: Area 1 (Melrose Drive Area); Area 2 (Bess Hoey Church Road Area); Area 3 (Rucker Downs Area); Area 3A (East Marion Street Area); and Area 4 (Northeast Area).

After providing notice to all property owners within the proposed annexation areas, a public informational meeting was held on 23 March 2000 in the city council chambers and was attended by approximately 200 people. Thereafter, on 10 April 2000, a public hearing on the proposed annexations was held and on 20 April 2000 the City Council adopted the ordinances annexing each of the five areas. The ordinances established an effective date of 30 June 2000 for the annexations of Areas 2, 3, 3A, and 4 and an effective date of 30 June 2001 for Area 1.

On 16 June 2000, petitioners filed, pursuant to G.S. § 160A-50, a petition for judicial review of the action of the City. Pursuant to G.S. § 160A-50(i), the effective dates of the annexation of all five annexation areas have been stayed pending a final judgment in this case. On 21 March 2001, the superior court entered its order affirming in all respects the actions of the City in annexing each of the five areas. Petitioners gave notice of appeal.

The record on appeal contains but one assignment of error:

The petitioners assign as error the Court’s findings, conclusions and order that the annexation proceedings conducted by the City of Shelby were in substantial compliance with the substantive and procedural requirements of the annexation statutes, that the petitioners failed to show procedural irregularities, and the Court’s affirmation of the City of Shelby’s annexation of the subject five areas.

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This assignment of error does not comply with Rule 10(c)(1) of the North Carolina Rules of Appellate Procedure which provides in relevant part:

Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned.

N.C.R. App. P. 10(c)(1). The assignment of error contends three separate and distinct errors in a single assignment of error in violation of the rule. Moreover, it is broadside and does not specify plainly and concisely the legal basis upon which error is assigned. In addition, quite likely due to their failure to observe Rule 10(c)(1), petitioners have ignored the requirement of N.C.R. App. P. 28(b)(6) that, in an appellant's brief, "[i]mmediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal." The Rules of Appellate Procedure are designed to expedite appellate review and petitioners' failure to observe the requirements of the Rules subjects their appeal to dismissal. *See Bowen v. N.C. Dept. of Health & Human Services*, 135 N.C. App. 122, 519 S.E.2d 60 (1999); N.C.R. App. P. 25(b), 34(b)(1). Nevertheless, we have considered their arguments, N.C.R. App. P. 2, and affirm the trial court's order upholding the annexation of the five areas.

"Judicial review of an annexation ordinance is limited to determination of whether the annexation proceedings substantially comply with the requirements of the applicable annexation statute." *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 40, 265 S.E.2d 123, 135 (1980). "[S]light irregularities will not invalidate annexation proceedings if there has been substantial compliance with all essential provisions of the law." *In re Annexation Ordinance*, 278 N.C. 641, 648, 180 S.E.2d 851, 856 (1971). With respect to appellate review of an order entered after judicial review in the superior court of an annexation proceeding, this Court has stated:

[w]here the record upon judicial review of an annexation proceeding demonstrates substantial compliance with statutory requirements by the municipality, the burden is placed on petitioners to show by competent evidence a failure to meet those requirements or an irregularity in the proceedings which resulted in material prejudice

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Scovill Mfg. Co., Inc. v. Town of Wake Forest, 58 N.C. App. 15, 17-18, 293 S.E.2d 240, 243, *disc. review denied*, 306 N.C. 559, 294 S.E.2d 371 (1982). If the trial court's findings of fact are supported by competent evidence, they are binding on appeal. *Huyck Corp. v. Town of Wake Forest*, 86 N.C. App. 13, 356 S.E.2d 599 (1987), *affirmed*, 321 N.C. 589, 364 S.E.2d 139 (1988). However, the conclusions of law drawn from these findings are subject to *de novo* review. *Id.*

In their appellate brief, petitioners first argue that the City has not made sufficient plans to extend police services to the annexed areas in violation of G.S. § 160A-47(3)a and that the City has failed to set forth a proposed timetable for the construction of water and sewer lines in violation of G.S. § 160A-47(3)c. However, these grounds for invalidation of the annexation ordinances were not alleged in the petition for judicial review nor were they presented to the trial court. It is well established that if an argument is not raised in the trial court, this Court will not consider it on appeal. *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 140 N.C. App. 99, 535 S.E.2d 415 (2000), *affirmed*, 354 N.C. 298, 554 S.E.2d 634 (2001); *Town of Chapel Hill v. Burchette*, 100 N.C. App. 157, 394 S.E.2d 698 (1990). Therefore, we will not consider these contentions.

Petitioners also argue that the City's Resolution of Consideration, adopted on 7 December 1998, which designated " 'Cleveland County (Shelby) Township No. 6' " as the area under consideration for annexation, was a vague and overbroad description designed to usurp the statutory requirements of G.S. § 160A-49(i). G.S. § 160A-49(i) requires that the resolution "identif[y] the area as being under consideration for annexation. . . ." In the instant case, the resolution fulfills this requirement by identifying " 'Cleveland County (Shelby) Township No. 6' by the official mapping of Cleveland County" as the area under consideration for purposes of annexation planning. Further, according to the statute, the resolution "may have a metes and bounds description or a map." As a general rule, "when the word 'may' is used in a statute, it will be construed as permissive and not mandatory." *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) (citations omitted). Applying this rule to the present case, neither a metes and bounds description nor a map were required. Moreover, the statute specifically contemplates that "[t]he area described under the resolution of intent may comprise a smaller area than that identified by the resolution of consideration." Thus, we conclude the City substantially complied with G.S. § 160A-49(i).

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In a separate argument, petitioners contend the boundary lines of Annexation Areas 1 and 4 are arbitrary and capricious because portions of each of these areas are connected to other portions by street rights-of-way. G.S. § 160A-48(b)(1) and (2) provide:

- (b) The total area to be annexed must meet the following standards:
 - (1) It must be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun. . . .
 - (2) At least one eighth of the aggregate external boundaries of the area must coincide with the municipal boundary.

The term "contiguous area" is defined as:

any area which, at the time annexation procedures are initiated, either abuts directly on the municipal boundary or is separated from the municipal boundary by a street or street right-of-way, a creek or river, the right-of-way of a railroad or other public service corporation, lands owned by the municipality or some other political subdivision, or lands owned by the State of North Carolina.

N.C. Gen. Stat. § 160A-41(1) (2001).

It is undisputed that Annexation Areas 1 and 4 satisfy the one-eighth coincidence requirement. In Annexation Area 1 and 4, portions of each area are connected to other portions by the annexation of a street right-of-way corridor. Our Supreme Court has approved the connection of one portion of an annexation area to another portion through the use of such a corridor. *Hawks v. Town of Valdese*, 299 N.C. 1, 261 S.E.2d 90 (1980). In *Hawks*, the Court approved the connection of two sub-areas which were connected by a 30 foot wide strip of land (constituting one-half of the right-of-way for Highway U.S. 64-70). Significantly, similar to the present case, only one of the two sub-areas connected by the right-of-way was itself contiguous to the primary corporate limits. Following *Hawks*, we conclude that petitioners have failed to carry their burden to show noncompliance with G.S. § 160A-48(b).

Finally, petitioners assert that the City's employees unreasonably denied potential new residents their right to be heard by limiting individuals to one question at the informational hearing. According to

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petitioners, this procedural irregularity harmed the residents of the newly proposed annexed areas by not giving them the appropriate information necessary for them to decide whether to support or oppose the proposed annexation.

N.C. Gen. Stat. § 160A-49(c1) requires:

all persons resident or owning property in the territory described in the notice of public hearing, and all residents of the municipality, shall be given the opportunity to ask questions and receive answers regarding the proposed annexation.

The trial court found as a fact that all persons attending the public informational meeting were given the opportunity to ask one or more questions to which the city representatives responded. Accordingly, the trial court concluded that the City was in substantial compliance with the statute.

The trial court's finding of fact is supported by the evidence. Though Ms. Ruth Horton testified that the people who attended the informational hearing were only allowed to ask one question, several other witnesses testified that there was no limit placed on the number of questions which any individual was permitted to ask. Additionally, Mr. Steven Hal Mason, assistant city manager, stated that before the meeting ended, he inquired of the audience if anyone wished to ask any more questions, and the meeting was terminated only after he received no response to his inquiry. Because the trial court's finding is supported by the evidence, it is conclusive on appeal. *See Huyck*, 86 N.C. App. 13, 356 S.E.2d 599. This finding of fact in turn supports the trial court's conclusion that the public informational meeting was conducted in substantial compliance with G.S. § 160A-49(c1).

Affirmed.

Judges WYNN and CAMPBELL concur.

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[152 N.C. App. 150 (2002)]

STATE OF NORTH CAROLINA v. RONALD RAY STARNER

No. COA01-996

(Filed 6 August 2002)

1. Evidence— prior crimes or bad acts—sexual abuse of young female family members—common plan or scheme

The trial court did not err in a first-degree statutory sexual offense and taking indecent liberties case involving defendant's stepdaughter by allowing under N.C.G.S. § 8C-1, Rule 404(b) the testimony of defendant's natural daughter concerning his sexual abuse of her, because: (1) the testimony of defendant's sexual assaults against his natural daughter showed a common plan or scheme by defendant of abusing young female family members; and (2) the evidence reveals past wrongs by defendant that are strikingly similar and not too remote in time to the alleged crimes in this case involving defendant's stepdaughter.

2. Witnesses— children—ordering public to leave courtroom not plain error

The trial court did not commit plain error in a first-degree statutory sexual offense and taking indecent liberties case involving defendant's stepdaughter by ordering the public to leave the courtroom during the voir dire of defendant's natural daughter, because: (1) the trial court asked defendant if he objected to the closure and after defendant's counsel responded that he did not, the closure was limited to voir dire testimony only; (2) where defendant consents to the closure, the trial court is not required to make specific findings of fact; and (3) even if the trial court had erred, defendant failed to show that the jury would have reached a different result absent the alleged error.

3. Sentencing— aggravating factor—victim very young

The trial court did not err in a first-degree statutory sexual offense and taking indecent liberties case by imposing an aggravated range sentence based on the aggravating factor that the victim, defendant's stepdaughter, was very young, because the combined factor of the child victim's young age and defendant's position of authority rendered the child more vulnerable to these crimes.

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[152 N.C. App. 150 (2002)]

Appeal by defendant from judgment entered 25 April 2001 by Judge Michael E. Helms in Forsyth County Superior Court. Heard in the Court of Appeals 15 May 2002.

Roy Cooper, Attorney General, by Anita LeVeaux, Assistant Attorney General, for the State.

J. Clark Fischer for defendant-appellant.

THOMAS, Judge.

Defendant, Ronald Ray Starnier, appeals from convictions of first-degree sexual offense against a child and taking indecent liberties with a child. He sets forth three assignments of error. For the reasons herein, we find no error.

The State's evidence tends to show the following: "B," defendant's nine-year-old stepdaughter, testified that "lots of times," beginning when she was as young as four years of age, defendant made her feel uncomfortable by placing his finger in her anus. As soon as B's mother left for work at 4:00 A.M., defendant would sometimes remove B's underwear and place her on the bed in the living room. While playing a pornographic video of adults and children engaging in sexual activity, defendant would insert his finger inside B's anus, rub himself "where he 'pee-pees' " and then "pee-pee" on her.

B was afraid of defendant. Defendant repeatedly threatened to kill her if she told anyone. B had also seen defendant hold a knife to her mother's throat and threaten to kill her. B's mother testified that the child had indeed seen defendant threaten her with a knife.

B's mother further testified that B told her about the abuse. B also told a school counselor, who made a referral to the Forsyth County Department of Social Services. Dr. Christopher Scheaffer, a clinical psychologist, evaluated B and determined that her conceptual development was slightly below her age level. Scheaffer testified that she was consistent in giving him details of the sexual abuse.

Defendant's sixteen-year-old natural daughter, "M," testified that defendant began sexually abusing her when she was five years old. When M's mother was not at home, defendant would sometimes instruct M to put on a dress but not wear underwear. He then placed a blanket on the floor and played a pornographic video. Defendant would then anally rape M. He told her that if she told anyone he would kill her.

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M's fifteen-year-old cousin testified that when she was five years old and visiting M, she hid in the basement during a game of hide-and-seek. Defendant was also in the basement. He showed her his penis and tried to get her to touch it. The cousin's mother filed charges against defendant but eventually decided to drop them because she did not want to put her daughter through the ordeal of testifying.

On 19 July 2000, defendant gave a statement to Forsyth County Sheriff's Department Juvenile Detective Karen Boyd admitting that on two occasions he had "played with [his penis]" and had inserted his finger in B's anus while watching a pornographic video in the living room. After Boyd had read the statement back to defendant three times, he signed it. Detective Charles Lynch then interviewed defendant. Defendant admitted to masturbating and putting his finger in B's anus while watching pornographic videos with her.

Defendant testified that he did not read the statement before signing it, and he only signed it because he understood he would not be allowed to go home otherwise. He denied abusing B or possessing any pornographic videos with children in them.

Defendant was found guilty of first-degree statutory sex offense and taking indecent liberties with a child. He was sentenced to consecutive terms of 360 to 441 months for the first offense, and 24 to 29 months for the second. He appeals.

[1] By his first assignment of error, defendant contends the testimony of M was inadmissible under Rule 404(b) of the North Carolina Rules of Evidence. The Rule provides:

(b) Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2001). If the proffered evidence is admissible under the Rule, the trial court must then examine whether the probative value of the evidence outweighs its prejudicial effects. *State v. White*, 135 N.C. App. 349, 352, 520 S.E.2d 70, 72, *disc. review allowed*, 351 N.C. 120, 541 S.E.2d 472, *review withdrawn*, 351 N.C. 190, 541 S.E.2d 726 (1999). "[T]he ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative

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than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403.’ ” *Id.* (quoting *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988)).

Here, M’s testimony of defendant’s sexual assaults against her shows a “common plan or scheme,” by defendant of abusing young female family members. *State v. Frazier*, 344 N.C. 611, 615-16, 476 S.E.2d 297, 299-300 (1996) (allowing testimony of defendant’s prior similar acts of sexual abuse against female adolescent family members). We therefore find the evidence admissible under Rule 404.

We further hold that the testimony passes the balancing test required by Rule 403. While certainly prejudicial to defendant, the evidence is more probative in that it reveals past wrongs by defendant that are strikingly similar and not too remote in time to the alleged crimes here. The incidents involve a daughter and a stepdaughter. Both girls were sexually assaulted by defendant’s placing either his finger or his penis in their anus while he played pornographic videos. Both girls were assaulted in their own home, while defendant was their caretaker, and while their mothers were not home. Defendant began abusing B and M when they were four and five years of age, respectively. The abuse of M stopped only when she was taken from defendant’s home and he no longer had access to her. The abuse of B occurred shortly after defendant married B’s mother and began living with the child. Moreover, the three to four year time lapse between the abuse of M and B does not render the incidents too remote in time to be admissible. *See State v. Penland*, 343 N.C. 634, 654, 472 S.E.2d 734, 745 (1996) (stating that a ten-year gap between instances of similar sexual misbehavior did not render them so remote in time as to negate the existence of a common plan or scheme), *cert. denied*, 519 U.S. 1098, 136 L. Ed. 2d 725, *reh’g denied*, 520 U.S. 1140, 137 L. Ed. 2d 366 (1997). Accordingly, the trial court properly admitted M’s testimony of strikingly similar abuse by defendant.

[2] By defendant’s second assignment of error, he argues that the trial court committed plain error by ordering the public to leave the courtroom during the *voir dire* of defendant’s daughter, M. We disagree.

In the trial of cases for rape or sex offense or attempt to commit rape or attempt to commit a sex offense, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case.

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N.C. Gen. Stat. § 15-166 (2001). "In clearing the courtroom, the trial court must determine if the party seeking closure has advanced an overriding interest that is likely to be prejudiced, order closure no broader than necessary to protect that interest, consider reasonable alternatives to closing the procedure, and make findings adequate to support the closure." *State v. Jenkins*, 115 N.C. App. 520, 525, 445 S.E.2d 622, 625, (citing *Waller v. Georgia*, 467 U.S. 39, 48, 81 L. Ed. 2d 31, 39 (1984), *disc. review denied*, 337 N.C. 804, 449 S.E.2d 752 (1994)), *temporary stay allowed*, 336 N.C. 784, 447 S.E.2d 435, *disc. review denied*, 337 N.C. 804, 449 S.E.2d 752 (1994).

In the present case, the trial court asked defendant if he objected to the closure. After defendant's counsel responded that he did not, the closure was limited to *voir dire* testimony only. The courtroom was reopened to the public at the conclusion of *voir dire*, and defendant's cross-examination of M resumed. The trial court, however, made no findings to support the closure. Nevertheless, we hold that where defendant consents to the closure, the trial court is not required to make specific findings of fact. *Cf. Waller*, 467 U.S. at 48, 81 L. Ed. 2d at 39 (requiring the trial court, where it ordered closure *over objection of the defendant*, to make closure no broader than necessary, consider other alternatives, and to make findings of fact in order to protect Sixth Amendment public-trial guarantee).

Moreover, in order to prevail under a plain error analysis, a defendant must show: (1) there was error; and (2) without this error, the jury would probably have reached a different verdict. *State v. Faison*, 330 N.C. 347, 361, 411 S.E.2d 143, 151 (1991). Based on the testimony of B, M, M's cousin, and defendant's admissions to Detectives Boyd and Lynch, even if the trial court had erred, defendant failed to show that the jury would have probably reached a different verdict had the court not ordered closure during the *voir dire* of M.

[3] By his last assignment of error, defendant contends the trial court erred in imposing an aggravated range sentence based on the aggravating factor that the victim was very young. Defendant argues that the evidence in the record does not support this aggravating factor because there is nothing in it suggesting the victim's age rendered her more vulnerable to sexual assault than an older child. We disagree.

Defendant was convicted under section 14-202.1, which provides that a person is guilty of taking indecent liberties with children if he

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“[w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child . . . under the age of 16 years for the purpose of arousing or gratifying sexual desire,” or “[w]illfully commits or attempts to commit any lewd or lascivious act upon . . . any child of either sex under the age of 16 years.” N.C. Gen. Stat. § 14-202.1 (2001). Defendant was also convicted under section 14-27.4(a)(1), which states that a person is guilty of a sexual offense in the first degree if he “engages in a sexual act . . . with a . . . child under the age of 13 years” N.C. Gen. Stat. § 14-27(a)(1) (2001). This Court has stated:

Where age is an element of the offense, as here, the trial court can properly find the statutory aggravating factor based on age if “the evidence, by its greater weight, shows that the *age of the victim caused the victim to be more vulnerable to the crime* committed against him than he otherwise would have been[.]”

State v. Rudisill, 137 N.C. App. 379, 380, 527 S.E.2d 727 (2000) (emphasis added) (quoting *State v. Farlow*, 336 N.C. 534, 540, 444 S.E.2d 913, 917 (1994)).

In *Rudisill*, this Court held that the trial court’s finding that the victim, a seven-year-old child, was “very young,” could not alone be used to aggravate the sentence for a conviction of indecent liberties with children. 137 N.C. App. at 381, 527 S.E.2d at 728. Here, B first became a victim of defendant’s abuse when she was four years old. A child of four years is far more vulnerable than an older child because she is less able to verbalize the abuse that has happened to her.

Moreover, in *Farlow*, our Supreme Court held that the trial court properly aggravated the sentence for a conviction of indecent liberties with a minor because the trial court did not find the statutory aggravating factor that the victim, an eleven-year-old, was “very young.” 336 N.C. at 540, 444 S.E.2d at 917. Rather, the basis for aggravating the sentence was the nonstatutory factor that the defendant’s “actions at the age of the victim in this offense made that victim particularly vulnerable to the offense committed.” *Id.* Specifically, the defendant “increased [the] vulnerability of the victim [by] . . . bestowing gifts on him.” *Id.*

Similarly, the trial court here found another aggravating factor, albeit statutory, besides that the victim was “very young.” It found that defendant “took advantage of a position of trust or confidence to

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commit the offense.” Defendant lived with B and was her stepfather. Defendant took advantage of his position as defendant’s primary caretaker by waking B shortly after her mother left for work to sexually abuse her. He then threatened to kill her if she told anyone. We hold that the combined factors of B’s young age and defendant’s position of authority rendered the child more vulnerable to these crimes. Accordingly, the trial court properly aggravated defendant’s sentence.

NO ERROR.

JUDGES WYNN and HUNTER concur.

STATE OF NORTH CAROLINA v. WILLIAM EARNEST MOORE

No. COA01-779

(Filed 6 August 2002)

1. Search and Seizure— warrant—improper address—failure to use full name—motion to suppress

The trial court did not err in a trafficking in cocaine and knowingly maintaining a place to keep or sell a controlled substance case by denying defendant’s motion to suppress the evidence seized at defendant’s home pursuant to a search warrant even though the warrant did not use defendant’s full name and defendant’s address was listed as “996” instead of “995,” because: (1) the executing officer’s prior knowledge of the house to be searched is relevant, and the officer had previously been to defendant’s residence and observed defendant there; (2) the address described in the search warrant may differ from the address of the residence actually searched; and (3) a search warrant is not defective for failure to specifically name a defendant.

2. Discovery— lab reports—motion to suppress—failure to disclose prior to trial

The trial court did not abuse its discretion in a trafficking in cocaine and knowingly maintaining a place to keep or sell a controlled substance case by refusing to suppress lab reports and the testimony of two SBI lab agents, or by failing to dismiss the charges based on the State’s failure to disclose the lab reports

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prior to trial, because: (1) the trial court offered defendant a continuance or recess so he could have independent lab testing conducted; (2) defendant was also offered an opportunity to request a mistrial; and (3) the State was ordered to provide full discovery to defendant, who was then allowed time to review the lab reports and conduct a voir dire of the lab agents.

3. Appeal and Error— preservation of issues—failure to state specific grounds for objection

Although defendant contends the trial court erred in a trafficking in cocaine and knowingly maintaining a place to keep or sell a controlled substance case by overruling defendant's objection to a witness's statement regarding undercover drug purchases, defendant failed to preserve this issue because: (1) defendant lodged a general objection without stating specific grounds for the ruling he desired the court to make; and (2) even assuming arguendo that the admission of the statement constituted error, it did not rise to the level of prejudicial error.

4. Witnesses— expert—qualifications—extensive knowledge and training

The trial court did not err in a trafficking in cocaine and knowingly maintaining a place to keep or sell a controlled substance case by qualifying a witness as an expert in the sale, manufacture, and possession of cocaine, and allowing him to testify about a hypothetical drug operation, because: (1) the length of the witness's employment as a narcotics officer, as well as his knowledge of cocaine manufacturing, the division and packaging of the drug, and his extensive knowledge of illegal drug operations, all provided him with the requisite expertise to testify to a hypothetical question based on the facts of the case; and (2) his answer to the hypothetical was helpful to the trier of fact and did not invade the province of the jury.

Appeal by defendant from judgment entered 4 August 2000 by Judge William C. Gore, Jr. in Columbus County Superior Court. Heard in the Court of Appeals 18 April 2002.

Roy Cooper, Attorney General, by Mark J. Pletzke, Assistant Attorney General, for the State.

Lee & Lee, by Junius B. Lee, III, for defendant-appellant.

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[152 N.C. App. 156 (2002)]

THOMAS, Judge.

Defendant, William Earnest Moore, appeals convictions of two counts of knowingly maintaining a place to keep or sell a controlled substance, one count of trafficking in cocaine by possession, and one count of trafficking in cocaine by manufacturing. He sets forth five assignments of error. For the reasons herein, we find no error.

The State's evidence tends to show the following: Detective Matt Dennis of the Bladen County Sheriff's Department testified that on five separate occasions he and a man named Charles Haley went to defendant's residence. Dennis provided money to Haley and then observed from the rear view mirror of his vehicle as Haley went inside the residence and returned with an off-white crystalline substance. Haley would then inform Dennis that "Earnest" sold him the cocaine. Due to poor lighting conditions, Dennis was unable to discern whether the address written in black numbers on defendant's mobile home was "995" or "996." Dennis told this to his supervising officer, Detective Sergeant Kyle Jones, and also informed him that the residence was a single wide mobile home with brown trim and was the first of two mobile homes in the driveway.

Subsequently, Detective Tom Arnold took a confidential source of information (CSI) to defendant's mobile home. The CSI had earlier told Arnold that he was able to buy controlled substances at Camp Ground Road from a man named William Earnest Moore. Arnold gave the CSI money and observed him go into defendant's home and purchase what Arnold believed to be cocaine. Arnold told Jones the address number was 996 and the mobile home was white with brown trim. He also said it was the first of two mobile homes in the driveway.

Within forty-eight hours of the time Arnold and the CSI visited defendant's residence, a search warrant was issued. A map to defendant's home was attached to the search warrant, and the mobile home was described as being white with brown trim. Jones said he believed the address of the first trailer, where all of the drug activity took place, was 996 Camp Ground Road. He listed that address in the search warrant as the residence to be searched. The actual address of defendant's home is 995 Camp Ground Road.

Arnold, one of the officers involved in the search, testified he went to the same mobile home where he had observed the CSI purchase cocaine. Defendant's mobile home, at 995 Camp Ground Road,

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was the one searched, with a number of items, including cash and illegal drugs, seized. Additionally, an off-white substance and \$1,168.90 were obtained from defendant's trousers. In all, \$24,256.90 was seized from defendant's clothes, dresser drawers, and areas under the mobile home's carpeting. A loaded .38 special revolver was found in the bottom of the oven, while a nine millimeter pistol and a set of scales were found in a cabinet. While searching a shed behind defendant's residence, Arnold discovered a plastic container filled with an off-white rock-like substance, a rifle, and a set of scales.

Defendant made a motion to suppress the seized evidence. At the suppression hearing, the trial court found that, although the warrant listed the incorrect address, sufficient probable cause existed to issue it. The court further concluded there was no substantial violation under N.C. Gen. Stat. § 15A-974(2) requiring suppression of the evidence.

At trial, defendant was found guilty and sentenced to two consecutive forty-five day terms for the two offenses of knowingly maintaining a place to keep or sell a controlled substance plus two more consecutive thirty-five to forty-two month terms for the two trafficking offenses. He appeals.

[1] By his first assignment of error, defendant contends that the trial court erred in denying his motion to suppress the evidence seized pursuant to the search warrant. Defendant maintains the warrant failed to identify the persons or places to be searched with sufficient particularity in that his full name was not used, the address was listed as "996" and not "995," and defendant rented the mobile home from his brother, who is not listed in the warrant as the owner. We disagree.

In reviewing the denial of a motion to suppress, we examine the evidence introduced at trial in the light most favorable to the State to determine whether the facts are supported by competent evidence and whether those factual findings in turn support legally correct conclusions of law. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982); *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

A search warrant must contain a "designation sufficient to establish with reasonable certainty the premises, vehicles, or persons to be searched," and a "description or a designation of the items constituting the object of the search and authorized to be seized." N.C. Gen.

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Stat. §§ 15A-246(4) and 15A-246(5) (2001). The executing officer's prior knowledge of the house to be searched is relevant. *State v. Cloninger*, 37 N.C. App. 22, 25, 245 S.E.2d 192, 195 (1978). Additionally, the address described in the search warrant may differ from the address of the residence actually searched. *State v. Walsh*, 19 N.C. App. 420, 423, 199 S.E.2d 38, 40-41, *disc. review denied*, 284 N.C. 258, 200 S.E.2d 658 (1973). A search warrant is not defective for failure to specifically name a defendant. *State v. Hansen*, 27 N.C. App. 459, 464-65, 219 S.E.2d 641, 644 (1975), *cert. denied*, 289 N.C. 453, 223 S.E.2d 161 (1976). Nor is it defective for erroneously listing the defendant as the actual owner of the residence. *See State v. Woods*, 26 N.C. App. 584, 587, 216 S.E.2d 492, 494, (error naming son rather than father as the owner of the premises does not render the description fatally defective), *appeal dismissed*, 288 N.C. 396, 218 S.E.2d 469 (1975).

Here, the warrant describes defendant as a black male named "Ernest." It states that Ernest resides in a single wide mobile home with brown trim and that the number "996" is affixed to the right of the front door. A map to defendant's residence is attached to the warrant. Further, Arnold had previously been to defendant's residence and observed defendant there. The facts are therefore supported by competent evidence with the findings supporting legally correct conclusions of law. Defendant's contention that the evidence seized pursuant to this search warrant must be suppressed is without merit.

[2] By his second assignment of error, defendant contends that, because of the State's failure to disclose lab reports of the off-white rock-like substance prior to trial, the trial court erred when it refused to suppress the lab reports and the testimony of two State Bureau of Investigation lab agents, or to dismiss the charges. Defendant maintains that the trial court abused its discretion in only allowing defendant the option of moving for a mistrial or having a continuance to review the lab reports. We disagree.

N.C. Gen. Stat. § 15A-910 provides:

If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may

- (1) Order the party to permit the discovery or inspection, or
- (2) Grant a continuance or recess, or

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(3) Prohibit the party from introducing evidence not disclosed, or

(3a) Declare a mistrial, or

(3b) Dismiss the charge, with or without prejudice, or

(4) Enter other appropriate orders.

N.C. Gen. Stat. § 15A-910 (2001). While the trial court has the authority to impose discovery violation sanctions, it is not required to do so. *State v. Hodge*, 118 N.C. App. 655, 657, 456 S.E.2d 855, 856 (1995). Therefore, whether sanctions are imposed is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *Id.* at 657, 456 S.E.2d at 857. “An abuse of discretion occurs when the trial court’s ruling ‘is so arbitrary that it could not have been the result of a reasoned decision.’” *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)), *disc. review denied*, 347 N.C. 670, 500 S.E.2d 84 (1998).

Here, the trial court offered defendant a continuance or recess so he could have independent lab testing conducted. Defendant was also offered an opportunity to request a mistrial. The State, meanwhile, was ordered to provide full discovery to defendant, who was then allowed time to review the lab reports and conduct a *voir dire* of the lab agents. Therefore, we cannot say the trial court’s refusal to exclude the lab test results or dismiss with prejudice the charges against defendant was so arbitrary that it could not have been the result of a reasoned decision. Accordingly, we reject this assignment of error.

By his third assignment of error, defendant contends that due to the insufficiency of evidence the trial court erred in denying his motion to dismiss. He argues that if this Court finds either (1) that the search warrant was not proper, or (2) that the testimony of two chemists was improperly admitted, then the evidence was not sufficient to submit the charges to the jury. We rejected both of these contentions in our analyses of the preceding two assignments of error. We therefore need not examine this assignment of error.

[3] By defendant’s fourth assignment of error, he contends the trial court erred in overruling his objection to a witness’s statement regarding the undercover drug purchases. We disagree.

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At trial, Jones testified that he employed an officer to make undercover drug purchases north of Whiteville “due to a problem we had occur in the area.” Defendant contends he is entitled to a new trial because the proper foundation and basis had not been laid for admission of the statement, which implies that defendant was the source of some problem.

We note initially that defendant lodged a general objection to Jones’s statement and thus failed to preserve this issue for appeal. *See* N.C.R. App. P. 10(b)(1) (“In order to preserve a question for appellate review, a party must have presented to the trial court a timely . . . objection . . . stating the specific grounds for the ruling the party desired the court to make[.]”). Even assuming *arguendo* that the admission of the statement did constitute error, it did not rise to the level of prejudicial error. *See State v. Crawford*, 104 N.C. App. 591, 598, 410 S.E.2d 499, 503 (1991) (“If there is overwhelming evidence of defendant’s guilt or an abundance of other evidence to support the State’s contention, the erroneous admission of evidence is harmless.”).

Here, the record indicates an abundance of other evidence properly admitted at trial of defendant’s guilt. When Dennis told Haley he would like to purchase cocaine, Haley took him to defendant’s residence. Thereafter, a reliable CSI informed Arnold that defendant sold cocaine from his residence. Additionally, substantial evidence was presented that several drug purchases made at defendant’s residence were observed by police officers. Accordingly, this assignment of error is overruled.

[4] By his last assignment of error, defendant contends the trial court erred by qualifying Dennis as an expert in the sale, manufacture, and possession of cocaine, and allowing him to testify about a hypothetical drug operation. We disagree.

For testimony to be admissible as expert testimony, the witness must be qualified by “knowledge, skill, experience, training, or education.” N.C.R. Evid. 702. Expert testimony is properly admissible when such testimony can assist the trier of fact to understand the evidence and to determine a fact in issue because the expert is better qualified. *Id.*

The record clearly supports the trial court’s findings that the length of Dennis’s employment as a narcotics officer, as well as his knowledge of cocaine manufacturing, the division and packaging of

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the drug, and his extensive knowledge of illegal drug operations, all provided him with the requisite expertise to testify to a hypothetical question based on the facts of this case. Accordingly, his answer to the hypothetical, "I would conclude that that was a drug operation," was helpful to the trier of fact and did not invade the province of the jury. We therefore reject defendant's last argument.

NO ERROR.

Judges MARTIN and TYSON concur.

KAWAI AMERICA CORPORATION AND PIEDMONT MUSIC, INC. D/B/A NORTH CAROLINA ARTISAN SELECT, PLAINTIFFS V. UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, DEFENDANT

No. COA01-1145

(Filed 6 August 2002)

1. Appeal and Error— appealability—governmental immunity—substantial right

An appeal from the denial of a motion to dismiss which asserted governmental immunity was interlocutory, but proper. Appeals raising issues of governmental immunity affect a substantial right.

2. Immunity— governmental—conversion—contract claims

The trial court erred by denying a motion to dismiss an action for conversion of pianos against a state university on the grounds of sovereign immunity, but not by denying a motion to dismiss a property damage claim which arose from contract provisions. The State has not waived sovereign immunity for intentional torts such as conversion, the superior court could not obtain judgment through pendant jurisdiction because only the General Assembly has authority to modify sovereign immunity, and the State implicitly consents to be sued when it enters into a contract.

Judge GREENE concurring.

Appeal by defendant from order entered 18 June 2001 by Judge Leon Stanback in Orange County Superior Court. Heard in the Court of Appeals 4 June 2002.

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[152 N.C. App. 163 (2002)]

Attorney General Roy Cooper, by Assistant Attorney General Celia Grasty Lata, for defendant-appellant.

Horton, Sloan & Gerber, P.L.L.C., by Norman L. Sloan, for plaintiff-appellees.

HUDSON, Judge.

The University of North Carolina at Chapel Hill (the “University”) appeals an order denying its motion to dismiss plaintiffs’ claims for conversion and damage to property on grounds of sovereign immunity, lack of personal and subject matter jurisdiction, and failure to state a claim upon which relief can be granted. For the reasons discussed below, we reverse in part, affirm in part, and remand.

The facts relevant to this appeal are not in dispute. Plaintiff Piedmont Music, Inc., (“Piedmont”) is a dealer of pianos manufactured by plaintiff Kawai America Corporation (“Kawai”). On or about 16 February 1995, plaintiffs entered into an agreement with the University, under which Piedmont through Kawai was to provide pianos to the University for use in its Department of Music, in exchange for pianos owned by the University that were in need of repair. According to the agreement, Kawai through Piedmont could loan additional pianos to the University, and Piedmont could offer for sale any pianos it had placed with the University to other customers, provided that Piedmont replaced any pianos sold with pianos of comparable model and quality. In the event of termination of the agreement, pianos that Piedmont had provided in exchange for pianos owned by the University would remain the property of the University, but pianos that were loaned to the University would be returned to Piedmont at Piedmont’s expense.

At some point prior to the initiation of this action, the parties decided to terminate the agreement. A dispute then arose over the return of the pianos. The parties agreed that certain pianos were to be returned to plaintiffs, and plaintiffs received these pianos. Plaintiffs contend, however, that the pianos were returned to them in damaged condition and that they are entitled to compensation for the damage under the terms of the agreement. Plaintiffs further contend that there are fourteen additional pianos that they did not receive, to which they are entitled under the agreement.

On 26 February 2001, plaintiffs filed a complaint against the University in Orange County Superior Court. The complaint alleged

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four causes of action: (1) breach of contract; (2) in the alternative, conversion; (3) damage to property; and (4) claim and delivery. Subsequently, plaintiffs voluntarily dismissed without prejudice the fourth cause of action pursuant to Rule 41 of the North Carolina Rules of Civil Procedure. The University moved to dismiss the claims for conversion and damage to property, asserting sovereign immunity, lack of personal and subject matter jurisdiction, and failure to state a claim upon which relief can be granted. The court denied the motion to dismiss, and the University appeals.

[1] This Court has “repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review.” *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999). Therefore, although interlocutory orders such as a denial of a motion to dismiss are not generally immediately appealable, this appeal is properly before us. *See Vest v. Easley*, 145 N.C. App. 70, 72, 549 S.E.2d 568, 571 (2001).

[2] Absent consent or waiver, “an action cannot be maintained against the State of North Carolina or an agency thereof.” *Guthrie v. State Ports Authority*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983) (emphasis omitted). Unless waived, “the immunity provided by the doctrine [of sovereign immunity] is absolute and unqualified.” *Price*, 132 N.C. App. at 559, 512 S.E.2d at 786 (internal quotation marks omitted). The University is a state agency to which the doctrine of sovereign immunity applies. *See Truesdale v. University of North Carolina*, 91 N.C. App. 186, 192, 371 S.E.2d 503, 506-07 (1988), *appeal dismissed and disc. review denied*, 323 N.C. 706, 377 S.E.2d 229, *cert. denied*, 493 U.S. 808, 107 L.Ed. 2d 19 (1989), *overruled on other grounds by Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied sub nom. Durham v. Corum*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). Therefore, unless the University consented to suit or waived its immunity regarding these claims, the claims are barred.

The State may statutorily waive sovereign immunity, but may then “be sued only in the manner and upon the terms and conditions prescribed.” *Alliance Co. v. State Hospital*, 241 N.C. 329, 332, 85 S.E.2d 386, 389 (1955) (internal quotation marks omitted). Statutes which authorize suit against the State, “being in derogation of the sovereign right to immunity, must be strictly construed.” *Guthrie*, 307 N.C. at 538, 299 S.E.2d at 627. One such statute, the State Tort Claims

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Act (the “Act”), provides in relevant part that the Industrial Commission may award damages in claims based on the negligence of “any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.” N.C. Gen. Stat. 143-291(a) (2001). The Act thus waives the sovereign immunity of the State with respect to “suits brought as a result of negligent acts committed by its employees in the course of their employment.” *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 329, 293 S.E.2d 182, 185 (1982). The Act also establishes that the forum for such suits is the Industrial Commission, rather than the State courts. *See id.*

This Court has stated that:

Suits against the State, its agencies and its officers for alleged tortious acts can be maintained only to the extent authorized by the Tort Claims Act, and that Act authorizes recovery only for negligent torts. Intentional torts committed by agents and officers of the State are not compensable under the Tort Claims Act.

Wojsko v. State, 47 N.C. App. 605, 610, 267 S.E.2d 708, 711 (citation omitted), *appeal dismissed and disc. review denied*, 301 N.C. 239, 283 S.E.2d 136 (1980); *see also Frazier v. Murray*, 135 N.C. App. 43, 48, 519 S.E.2d 525, 528 (1999) (“The Tort Claims Act does not give the Industrial Commission jurisdiction to award damages based on intentional acts.”), *appeal dismissed*, 351 N.C. 354, 542 S.E.2d 209 (2000). Our courts have clearly held that any modification or waiver of the doctrine of sovereign immunity must come from the General Assembly. *See Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 324, 420 S.E.2d 432, 435 (1992) (“We feel that any change in this doctrine [of sovereign immunity] should come from the General Assembly.”); *Guthrie*, 307 N.C. at 534, 299 S.E.2d at 625 (“It is for the General Assembly to determine when and under what circumstances the State may be sued.” (emphasis and internal quotation marks omitted)).

We note that this appeal concerns only the claims for conversion and damage to property. The University did not seek to dismiss the claim against it for breach of contract, correctly noting that the doctrine of sovereign immunity does not bar such a suit. “[W]henever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued

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for damages on the contract in the event it breaches the contract.” *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976). Our Supreme Court emphasized, however, that “[t]his decision has no application to the doctrine of sovereign immunity as it relates to the State’s liability for torts.” *Id.* at 322, 222 S.E.2d at 424.

If plaintiffs’ remaining claims were based on negligence, they could be pursued in the Industrial Commission but not in superior court. Conversion, however, is an *intentional* tort. *See Restatement (Second) of Torts* § 222A(1) (1965) (“Conversion is an intentional exercise of dominion or control over a chattel”); *see also Lewis v. Leasing Corp.*, 36 N.C. App. 556, 560, 244 S.E.2d 706, 709 (1978) (holding that an indemnity contract did not relieve parties from liability for the *intentional* tort of conversion). The State has not waived sovereign immunity for intentional torts by action of the Tort Claims Act or other statute. *See Wojsko*, 47 N.C. App. at 610, 267 S.E.2d at 711. The plaintiffs’ claim for conversion is therefore barred by the doctrine of sovereign immunity.

We are not persuaded by plaintiffs’ argument that the superior court could obtain jurisdiction over the conversion claim through the doctrine of pendent jurisdiction. Plaintiffs cite no legal authority in support of their novel theory that pendent jurisdiction can be used to waive sovereign immunity. Our Supreme Court has stated that only the General Assembly has the authority to modify the doctrine of sovereign immunity, and it has not done so in this manner. *See Blackwelder*, 332 N.C. at 324, 420 S.E.2d at 435; *Guthrie*, 307 N.C. at 534, 299 S.E.2d at 625. For the same reason, we reject plaintiffs’ argument that the superior court should take jurisdiction over the conversion claim in the interest of judicial economy.

Although a claim for damage to property ordinarily may be characterized as either an intentional tort or negligence, *see Murray v. Insurance Co.*, 51 N.C. App. 10, 14, 275 S.E.2d 195, 198 (1981); *Restatement (Second) of Torts* §§ 497, 499 (1965); *Restatement (Second) of Torts* § 871 (1979), here, the claim is neither. The complaint alleges that the University is responsible for paying for damage to pianos, by specific reference to the contract. In paragraph 26, plaintiffs “reallege paragraphs 1 through 17,” which are contained in the breach of contract allegations. In paragraph 27, the complaint alleges that “[t]he Agreement indicates that ‘University shall bear the risk of loss for the pianos while pianos are in University’s possession.’” Because “[u]pon information and belief, the pianos . . . were damaged while in the possession and under control of the

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University,” the plaintiffs requested damages. There are no allegations of negligent or intentional tortious behavior by the University, but rather references to liability stemming from the “Agreement.” Thus, as a claim based on allegations of contract, this claim is not barred by the doctrine of sovereign immunity. *See Smith*, 289 N.C. at 320, 222 S.E.2d at 423-24.

In conclusion, we hold that the trial court erred by denying defendant’s motion to dismiss the claim of conversion on grounds of sovereign immunity, but not by denying the motion to dismiss the claim for damage to property, which we believe arises from the contract allegations. We therefore reverse the trial court’s denial of the University’s motion to dismiss the conversion claim and affirm the denial of the University’s motion to dismiss the damage to property claim. Thus, we remand for entry of an order dismissing the conversion claim and for further proceedings in the breach of contract claim, which was not part of this appeal, and in the damage to property claim.

Reversed in part, affirmed in part, and remanded.

Judge BIGGS concurs.

Judge GREENE concurs in a separate opinion.

GREENE, Judge, concurring.

I fully concur in the majority opinion but write separately to clarify the issue of plaintiffs’ “damage to property” claim.

While plaintiffs’ “damage to property” claim seeks recovery for damage done to the pianos while in the University’s possession and is based on the contract provision wherein the University assumed the risk of any loss to the pianos, their “breach of contract” claim also seeks damages; but these damages are for breach of the contract provision holding the University responsible for the wrongful withholding of the pianos. As the two claims represent separate issues arising under the contract, the University’s sovereign immunity defense does not apply to either.

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WILLIAM D. ALEXANDER, PLAINTIFF v. LINDA B. ALEXANDER, DEFENDANT

No. COA01-1130

(Filed 6 August 2002)

**Malicious Prosecution— domestic violence protective order—
special damages**

The trial court erred by granting defendant's motion for a j.n.o.v. on a malicious prosecution claim arising from a domestic violence protective order where the prohibitions stemming from the order were sufficient to find that plaintiff suffered substantial interference with his person and property resulting in special damages.

Judge GREENE dissenting.

Appeal by plaintiff from an order entered 16 May 2001 by Judge Ronald K. Payne in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 June 2002.

Kenneth T. Davies for plaintiff-appellant.

No brief for defendant-appellee.

HUNTER, Judge.

William D. Alexander ("plaintiff") appeals the trial court's order granting Linda B. Alexander's ("defendant") motion for judgment notwithstanding the verdict on the ground that plaintiff failed to present evidence in support of the element of special damages necessary to maintain a malicious prosecution claim. We reverse.

Plaintiff and defendant were formally husband and wife. They are the parents of two children, one of which is a minor. On 2 May 1994, defendant filed a complaint in which she sought, *inter alia*, domestic violence protection pursuant to Chapter 50B of the North Carolina General Statutes. Defendant sought and obtained an *ex parte* domestic violence protective order which evicted plaintiff from the marital home, as well as granted her temporary custody of their children. Plaintiff entered into a consent order on 10 May 1994 that enjoined him from assaulting, harassing, or intimidating defendant. The consent order prohibited plaintiff from coming about the residence or workplace of defendant, and sequestered the former marital home for the temporary use and benefit of defendant and the minor child.

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On 5 June 1995, upon the expiration of the consent order, defendant initiated a complaint and motion for a domestic violence protective order in which she requested that plaintiff be ordered not to come about her, the residence, her work place, or the child's school. The judge issued an *ex parte* domestic violence protective order against plaintiff which enjoined him from assaulting, threatening, abusing, following, harassing or interfering with defendant. Additionally, a law enforcement officer was instructed to arrest plaintiff if there was probable cause to believe he had violated the protective order. After defendant's evidence was presented, when the hearing came before the trial judge on 14 June 1995, the court found that she failed to prove any acts of domestic violence. Hence, her claim for domestic violence against plaintiff was involuntarily dismissed.

On 15 September 1999, subsequent to the dismissal of defendant's domestic violence claim, plaintiff asserted claims for abuse of process, malicious prosecution, and alienation of affections against defendant. The court granted defendant's motion for directed verdict in regards to plaintiff's abuse of process and alienation of affections claims, but denied defendant's motion as to the malicious prosecution claim. On 9 November 2000, the jury returned a verdict in favor of plaintiff, finding that defendant maliciously instituted a domestic violence proceeding against plaintiff in 1995. The jury awarded nominal damages of one dollar (\$1.00), and punitive damages of one thousand five hundred dollars (\$1,500.00). Upon return of the jury verdict, the court granted defendant's motion for judgment notwithstanding the verdict on the issue of special damages. Plaintiff appeals and assigns error to the trial court's conclusion that his evidence was not legally sufficient to take the case to the jury and support a verdict in his favor on the issue of special damages.

Plaintiff contends that the trial court erred by granting defendant's motion for judgment notwithstanding the verdict on his malicious prosecution claim. We agree. A motion for judgment notwithstanding the verdict is simply a renewal of a party's earlier motion for directed verdict. *Kearns v. Horsley*, 144 N.C. App. 200, 207, 552 S.E.2d 1, 6 (2001). "On appeal the standard of review for a JNOV [judgment notwithstanding the verdict] is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury. . . ." *Id.* (citation omitted). The standard is high for the moving party as *the motion should be denied if there is more than a scintilla of evidence to support the plaintiff's prima facie case. Id.*

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Moreover, our Supreme Court has held that when ruling on a motion for directed verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(a) (2001), the trial court must consider the evidence in the light most favorable to the plaintiff. *Newton v. New Hanover County Bd. of Education*, 342 N.C. 554, 563, 467 S.E.2d 58, 65 (1996). "The evidence supporting the plaintiff's claims must be taken as true, and all contradictions, conflicts, and inconsistencies must be resolved in the plaintiff's favor, giving the plaintiff the benefit of every reasonable inference." *Id.*

In this case, we view plaintiff's evidence as sufficient to meet the *prima facie* case of malicious prosecution. Therefore, we hold that the trial court erred in granting defendant's motion for JNOV. Plaintiff argues that his evidence on the issue of special damages is legally sufficient to support a malicious prosecution claim against defendant. We agree. In order to recover for malicious prosecution, the plaintiff must show that the defendant initiated the earlier proceeding, that she did so maliciously, and without probable cause, and that the earlier proceeding terminated in the plaintiff's favor. *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979). In civil actions, the plaintiff must show that there was some arrest of his person, seizure of his property, or some other special damage resulting from the action such as would not necessarily result in all similar cases. *Id.* at 202-03, 254 S.E.2d at 625.

The gist of such special damage is a substantial interference either with the plaintiff's person or his property such as causing execution to be issued against the plaintiff's person, causing an injunction to issue prohibiting plaintiff's use of his property in a certain way, causing a receiver to be appointed to take control of plaintiff's assets, causing plaintiff's property to be attached, or causing plaintiff to be wrongfully committed to a mental institution.

Id. at 203, 254 S.E.2d at 625 (citations omitted). Furthermore, an interference with the use, enjoyment, transfer of, and profit from property is not the inherent and usual result of all civil litigation and could result in special damage. *Brown v. Averette*, 68 N.C. App. 67, 70, 313 S.E.2d 865, 867 (1984). However, embarrassment, inconvenience, loss of work and leisure time, stress, strain and worry are experienced by all litigants to one degree or another; hence, allegations of this kind would fail to qualify as substantial interference and would not constitute special damage. *Id.*

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In the instant case, the special damage requirement of the plaintiff's malicious prosecution claim is at issue. The *ex parte* domestic violence protective order was an injunction that substantially interfered with the plaintiff's person and property. This order enjoined plaintiff from assaulting, threatening, abusing, following, harassing or interfering with defendant, and plaintiff was ordered to stay away from the marital home. Moreover, a law enforcement officer was instructed to arrest plaintiff if there was probable cause to believe plaintiff had violated these injunction provisions. Consequently, these restrictions significantly interfered with plaintiff's rights of free movement, and communication with defendant, his then spouse. Moreover, these prohibitions greatly interfered with the use and enjoyment of plaintiff's personal property by ordering him to stay away from his home that he then shared with defendant. After analyzing all evidence in the light most favorable to plaintiff, and giving him the benefit of all reasonable inferences, we conclude that the prohibitions stemming from the *ex parte* domestic violence protective order are sufficient to find the plaintiff suffered substantial interference resulting in special damages.

Reversed.

Judge TIMMONS-GOODSON concurs.

Judge GREENE dissents in a separate opinion.

GREENE, Judge, dissenting.

I disagree with the majority that there is substantial evidence plaintiff suffered special damage as a result of the prohibitions in the *ex parte* domestic violence protective order. I, therefore, dissent.

In a malicious prosecution claim based on the institution of a prior civil proceeding,¹ a plaintiff must prove "that there was some arrest of his person, seizure of his property, or some other element of special damage resulting from the action such as would not necessarily result in all similar cases." *Stanback v. Stanback*, 297 N.C. 181, 203, 254 S.E.2d 611, 625 (1979). "The gist of such special damage is a substantial interference either with the plaintiff's person or his property such as . . . causing an injunction to issue prohibiting [the] plain-

1. The filing of a complaint for a domestic violence protective order is a civil action. N.C.G.S. § 50B-2(a) (2001).

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tiff's use of his property in a certain way." *Id.* (citations omitted). A slight interference with a person's movement is not enough to cause special damage as there must be a substantial interference with the plaintiff's right of movement. *U v. Duke Univ.*, 91 N.C. App. 171, 179, 371 S.E.2d 701, 707 (no special damage where the plaintiff was restricted from entering a building owned by the defendant and from using the defendant's instrument), *disc. review denied*, 323 N.C. 629, 374 S.E.2d 590 (1988). Likewise, if the interference is "merely an interference with some right of use" and not with the plaintiff's property, a party has suffered no special damage. *Id.* at 180, 371 S.E.2d at 707.

In this case, viewing the evidence in the light most favorable to plaintiff, *see Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986) (evidence is viewed in the light most favorable to the non-moving party on a motion for judgment notwithstanding the verdict), there was no substantial evidence plaintiff suffered special damage, *see Cobb v. Reitter*, 105 N.C. App. 218, 220, 412 S.E.2d 110, 111 (1992) (if non-moving party has not presented substantial evidence of the elements of his claim for relief, the moving party is entitled to judgment notwithstanding the verdict). The *ex parte* order required plaintiff to not "assault, threaten, abuse, follow, harass or interfere" with defendant, to "stay away from" defendant's residence, and to stay away from defendant's place of employment. Plaintiff cannot claim any damage arising from an order that directs he not assault or harass his wife. Furthermore, any restriction on plaintiff's right to be on the property where defendant resided² and the place where she worked was not substantial. In fact, as long as plaintiff did not harass, follow, or interfere with defendant, he remained free to move about in any place other than defendant's residence and her place of employment. In any event, the *ex parte* order was valid for only ten days and thus any interference was minimal.³ *See N.C.G.S. § 50B-2(c)* (2001).

2. The record shows defendant's residence was owned by plaintiff and defendant and had once served as their marital home. Plaintiff, however, had not resided there in more than a year and indeed had agreed, pursuant to a consent order, that those premises were to be "temporarily sequestered for the exclusive use and benefit" of defendant. The consent order did not fix an expiration date but, because it was entered pursuant to chapter 50B, it expired by operation of law on 11 May 1995. *See N.C.G.S. § 50B-3(b)* (2001). There is no evidence in the record plaintiff had made any attempt to visit defendant's residence after the expiration of the consent order.

3. The *ex parte* order was issued on 5 June 1995 and dissolved on 14 June 1995.

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Accordingly, I would affirm the trial court's judgment determining there was insufficient evidence to establish plaintiff suffered special damage.⁴

QSP, INC., PLAINTIFF V. A. WAYNE HAIR, DEFENDANT

No. COA01-1244

(Filed 6 August 2002)

1. Appeal and Error— appealability—denial of preliminary injunction—non-competition agreement—agreement prohibiting disclosure of confidential information—substantial right

Although an appeal of a trial court's ruling on a motion for preliminary injunction is generally an appeal from an interlocutory order, cases involving an alleged breach of a non-competition agreement and an agreement prohibiting disclosure of confidential information affect a substantial right and are therefore immediately appealable.

2. Injunction— preliminary—likelihood of success on merits—irreparable loss

The trial court erred by denying plaintiff corporation's motion for a preliminary injunction enjoining defendant from further breaching a confidentiality, no-solicitation, and noncompetition agreement, because: (1) plaintiff has shown a likelihood of success on the merits; and (2) plaintiff has shown it is likely to sustain irreparable loss unless the injunction is issued.

4. While I do not believe plaintiff has a claim for malicious prosecution, I do note that others who find themselves in situations similar to plaintiff's situation, without proof of special damage, may move for Rule 11 sanctions to be imposed against the opposing party. This motion may be made if the plaintiff believes the defendant's complaint for a domestic violence protective order was filed without sufficient basis in fact, existing law, or "a good faith argument for the extension, modification, or reversal of existing law," or that the complaint was filed for an "improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." N.C.G.S. § 1A-1, Rule 11(a) (2001). These sanctions may include "an order to pay the [plaintiff] . . . the amount of the reasonable expenses incurred because of the filing of the [complaint] . . . including a reasonable attorney's fee." *Id.*

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Appeal by plaintiff from order entered 29 June 2001 by Judge Wiley F. Bowen in Cumberland County Superior Court. Heard in the Court of Appeals 10 June 2002.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James T. Williams, Jr. and John W. Ormand, III, for plaintiff-appellant.

The Yarborough Law Firm, by Garris Neil Yarborough, for defendant-appellee.

EAGLES, Chief Judge.

On 24 May 2001, QSP filed an action against defendant for breach of a “Confidentiality, No-Solicitation, and Non-Competition Agreement.” QSP also filed a motion seeking a temporary restraining order against defendant. The trial court granted QSP’s motion for a temporary restraining order that same day. On 30 May 2001, QSP served defendant with a motion for preliminary injunction. After a hearing on 25 June 2001, the Honorable Wiley F. Bowen took the matter under advisement. On 28 June 2001, QSP filed a motion pursuant to N.C. R. Civ. P. 52(a)(2) requesting the trial court to include in its order findings of fact and conclusions of law. On 29 June 2001, the trial court entered its order denying QSP’s motion for preliminary injunction without making appropriate findings of fact and conclusions of law as requested by QSP in its Rule 52 motion. QSP appeals.

[1] Appeal of a trial court’s ruling on a motion for preliminary injunction is interlocutory. For appellate review to be appropriate, the trial court’s ruling must have deprived the appellant of a substantial right that will be lost absent review before final disposition of the case. N.C.G.S. §§ 1-277, 7A-27. In cases involving an alleged breach of a non-competition agreement and an agreement prohibiting disclosure of confidential information, North Carolina appellate courts have routinely reviewed interlocutory court orders both granting and denying preliminary injunctions, holding that substantial rights have been affected. *See, e.g., A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983); *Iredell Digestive Disease Clinic, P.A. v. Petrozza*, 92 N.C. App. 21, 373 S.E.2d 449 (1988), *aff’d*, 324 N.C. 327, 377 S.E.2d 750 (1989); *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 501 S.E.2d 353 (1998); *Masterclean of North Carolina, Inc. v. Guy*, 82 N.C. App. 45, 345 S.E.2d 692 (1986).

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Here, QSP asserts that defendant has certain confidential information and trade secrets and was competing in violation of the agreement. Thus, QSP moved the trial court to enter a preliminary injunction (1) prohibiting defendant from using or disclosing QSP's confidential information and trade secrets and (2) prohibiting defendant from soliciting for one year the same customers defendant solicited while working for QSP. At the outset, based on our review of the evidence in the record, we hold that plaintiff would be deprived of a substantial right absent a review prior to a final determination. Accordingly, appellate review is appropriate.

[2] The scope of appellate review of a trial court's grant or denial of a preliminary injunction is essentially *de novo*. *Robins & Weill, Inc. v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696 (1984). "[A]n appellate court is not bound by the [trial court's] findings, but may review and weigh the evidence and find facts for itself." *A.E.P. Indus.*, 308 N.C. at 402, 302 S.E.2d at 760. "[I]n North Carolina, restrictive covenants between an employer and employee are valid and enforceable if they are (1) in writing; (2) made part of a contract of employment; (3) based on valuable consideration; (4) reasonable both as to time and territory; and (5) not against public policy." *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 649-50, 370 S.E.2d 375, 380 (1988).

In considering the propriety of a preliminary injunction, this Court does not determine whether a confidentiality, no-solicitation, and non-competition agreement is in fact enforceable, but reviews the evidence and determines (1) whether plaintiff has met its burden of showing a likelihood of success on the merits and (2) whether plaintiff is likely to sustain irreparable loss unless the injunction is issued. *A.E.P. Indus.*, 308 N.C. at 401, 302 S.E.2d at 759.

I. Findings of Fact.

Based upon our *de novo* review of the evidence contained in the record, we find the following facts: Wayne Hair worked as an independent sales representative for World's Finest Chocolate, Inc. (WFC) for 17 years. WFC organized fund-raising programs and supplied goods (primarily chocolates) for resale by non-profit organizations, primarily schools and churches.

In February 2000, plaintiff QSP purchased from WFC the exclusive rights to distribute WFC's products. QSP also purchased goodwill which consisted of customer relationships, confidential informa-

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tion about contact persons, preferences and requirements of customers, and sales methods that WFC taught its distributors to use in the course of their sales efforts. As part of its agreement with WFC, QSP agreed to offer WFC distributors employment with QSP, contingent upon WFC employees' agreement to QSP's employment conditions.

To introduce WFC's distributors to QSP and to explain the employment opportunity, QSP invited WFC's 200 sales representatives, including defendant, to Atlanta, Georgia, to participate in a three-day informational event from 11 February 2000 to 14 February 2000. During the event, defendant received extensive information about QSP and the terms of QSP's employment offer. On 12 February 2000, QSP formally presented defendant with the opportunity to join QSP's sales force. Defendant received a written employment offer that included a "Confidentiality, No-Solicitation, and Non-Competition Agreement." On 13 February 2000, defendant signed QSP's employment contract and the confidentiality and non-competition agreement. Defendant began working as a representative for QSP on 23 May 2000.

On 3 April 2001, after working for QSP for approximately eleven months, defendant resigned. During the eleven months that defendant was employed with QSP, defendant sold fund-raising products and programs to at least 50 schools or other organizations located in Cumberland, Robeson, Wake, Durham, and Granville counties and generated in excess of \$700,000 in gross sales.

Shortly after resigning from QSP, defendant became an independent sales representative for William R. Mink & Co., Inc. (Mink), a competitor of plaintiff. In May 2001, QSP discovered that defendant, on behalf of Mink, had visited and contracted with several schools that defendant had serviced while working for QSP.

II. Conclusions of Law.

In light of these findings of fact and defendant's concessions at oral argument that the issues of territory and duration are not disputed, we first consider whether QSP has met its burden of showing a likelihood of success on the merits. The "Confidentiality, No-Solicitation, and Non-Competition Agreement" was part of a written employment agreement and was voluntarily signed by defendant. The agreement prohibits defendant from competing with QSP for twelve months in five North Carolina counties—Robeson, Wake, Durham, Cumberland, and Granville—and includes a tolling provision that pro-

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tests QSP's right to the benefit of the twelve month non-competition period. This provision states:

[Employee] agree[s] in light of the special nature of QSP's fund-raising business that if [employee] violate[s] this Agreement, appropriate relief by a court requires that the terms of paragraphs 1(a-f) and 3(b) will be extended for a period of twelve (12) months commencing on the date of [employee's] last violation of this Agreement

These time and territory provisions appear to be reasonable and not unduly oppressive. In February 2000, QSP purchased the exclusive rights to distribute WFC products. QSP's buyout, once effective, would have left defendant unemployed but for QSP's offer of employment to defendant and defendant's subsequent acceptance. This offer, made by QSP on 12 February 2000, was an offer of new employment and therefore constituted valuable consideration.

Pursuant to the employment agreement, defendant expressly agreed that information concerning QSP's accounts, business practices, and know-how was confidential and that defendant would not disclose any of this information to any business in competition with QSP. Defendant resigned from his employment as a QSP sales representative on 3 April 2001. Shortly thereafter, defendant began working as a sales representative for Mink, a QSP competitor. In the court below, QSP introduced evidence which showed that defendant used proprietary information in his role as a salesman for Mink and that defendant had solicited and contracted with several schools that defendant had serviced while working for QSP. Defendant adduced no contradictory evidence. After careful review of the record and the contentions of the parties, we hold that plaintiff has met its burden of showing a likelihood of success on the merits.

We next turn to the issue of whether QSP is likely to sustain irreparable loss unless the injunction is issued. "[I]ntimate knowledge of the business operations or personal association with customers provides an opportunity to [a] . . . former employee . . . to injure the business of the covenantee." *Kuykendall*, 322 N.C. at 649, 370 S.E.2d at 380. In *A.E.P. Industries*, our Supreme Court emphasized that this potential harm warrants injunctive relief:

"It is clear that if the nature of the employment is such as will bring the employee in personal contact with patrons or cus-

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tomers of the employer, or enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers, enabling him by engaging in a competing business in his own behalf, or for another, to take advantage of such knowledge of or acquaintance with the patrons and customers of his former employer, and thereby gain an unfair advantage, equity will interpose in behalf of the employer and restrain the breach”

A.E.P. Industries, 308 N.C. at 408, 302 S.E.2d at 763 (citation omitted).

Here, the evidence shows that (1) defendant is engaged in the solicitation of QSP’s clients and customers as a sales representative for Mink in violation of the Non-Competition Agreement; (2) defendant has misappropriated QSP’s confidential information while working for Mink; and (3) as a result of defendant’s actions, QSP will suffer irreparable injury if defendant is not restrained from further violating the “Confidentiality, No-Solicitation, and Non-Competition Agreement.” Accordingly, we hold that QSP is likely to sustain irreparable loss unless an injunction is issued.

From our review, it is clear that QSP has shown a likelihood of success on the merits and that QSP is likely to sustain irreparable loss unless the injunction is issued. Accordingly, the order of the trial court denying QSP’s motion for preliminary injunction is reversed and the case is remanded to the trial court for entry of a preliminary injunction enjoining defendant from further breach of the “Confidentiality, No-Solicitation, and Non-Competition Agreement.”

Reversed and remanded.

Judges WALKER and BIGGS concur.

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[152 N.C. App. 180 (2002)]

LARRY FRANKLIN BUCHANAN, PLAINTIFF v. BRENDA JOYCE DEITZ WEBER,
DEFENDANT

No. COA01-978

(Filed 6 August 2002)

Divorce—foreign judgment—title to real property—severability—full faith and credit

Although a Kansas divorce judgment attempted to determine the title to real property in North Carolina and it is accepted law in North Carolina that courts of one state cannot determine title to real property located in another state, that part of the judgment is severable and our courts are required to give full faith and credit to the remainder of the Kansas divorce judgment absent the sentence attempting to determine title to North Carolina property.

Appeal by defendant from judgment entered 14 December 2000 by Judge Thomas W. Seay in Jackson County Superior Court. Heard in the Court of Appeals 24 April 2002.

Law Offices of Kenneth W. Fromknecht, II, P.A., by Kenneth W. Fromknecht, II, for plaintiff-appellee.

Van Winkle Buck Wall Starnes & Davis, P.A., by Carolyn Clark, for defendant-appellant.

Amy E. Ray, for defendant-appellant.

CAMPBELL, Judge.

Defendant appeals an order finding her liable for breaching a divorce stipulation and agreement (“agreement”), which was subsequently incorporated into a Kansas divorce judgment that required her to disclose to plaintiff property she owned in North Carolina. We remand this case to the trial court to enter a judgment that is consistent with this opinion.

Plaintiff and defendant were married on 22 December 1965. On 21 September 1988, defendant’s parents deeded approximately 4.89 acres of property to defendant located in Jackson County, North Carolina, retaining a life estate in themselves. Defendant’s parents executed a deed releasing their life estate on 17 May 1989, leaving defendant with fee simple title in the property.

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On 13 December 1996, defendant filed for divorce in Leavenworth County, Kansas. At the same time, defendant filed a domestic relations affidavit (“affidavit”) that included information pertinent to the divorce. Under Item Number 15 of the affidavit, which set forth “real property identified as to description, ownership . . . and actual or estimated value,” plaintiff identified the parties’ marital home located in Lansing, Kansas. Under Item Number 16, which set forth “the property, if any, acquired by each of the parties prior to marriage or acquired during the marriage by a will or inheritance[,]” defendant identified the North Carolina property deeded to her by her parents. According to defendant, her attorney decided to list this property under Item Number 16 because it was originally intended to be a part of defendant’s inheritance; however, defendant’s parents gave defendant the property before they died so that they could see her enjoy it.

On 27 December 1996, plaintiff and defendant signed an agreement for the purpose of dividing their property and allocating custody and maintenance duties. Paragraph 19 of the agreement provided for the disposition of property undisclosed by either party and stated:

The parties acknowledge that each one has been furnished with sufficient information relating to the financial affairs of the other and that they have fully accounted for all property interest received prior to and during the marriage of the parties. Any property not disclosed and in which either party may have an interest of ownership shall, upon discovery of such ownership, be sold and the proceeds thereof divided equally between the parties hereto. This Agreement shall be considered an instrument of conveyance of one-half (1/2) interest in such property of the non-owning party hereunder.

The agreement was incorporated into and adopted as part of the parties’ divorce judgment that was entered on 13 February 1997 in the District Court of Leavenworth County, Kansas.

On 11 January 1999, approximately two years from the date of the divorce, plaintiff filed a complaint against defendant in the Superior Court of Jackson County, North Carolina. The complaint alleged that at the time of the parties’ divorce, defendant had failed to disclose to plaintiff her ownership of North Carolina property and that such failure was a violation of their agreement and subsequent divorce judgment. Plaintiff’s complaint raised claims for enforcement of a foreign

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judgment, fraud in the inducement, negligent misrepresentation, and breach of contract. On 11 May 1999, plaintiff amended his complaint to also include claims for specific performance and quiet title.

The trial in this matter began on 11 December 2000. Plaintiff testified that he first learned of defendant's ownership of the property when he found a property tax statement from Jackson County following their divorce. He also testified that defendant's affidavit listing the property was neither shown to him nor discussed. Defendant testified, however, that plaintiff became aware of her ownership of the property as soon as she received it and that they had discussed using the property to generate retirement income. Additionally, defendant offered the testimony of several other witnesses, such as the parties' two children, in an effort to establish plaintiff's knowledge of the property at the time of their divorce. Defendant also produced documentary evidence, such as copies of the parties' joint income tax returns and property tax statements, that suggested plaintiff was aware of her ownership of the property.

Despite the evidence presented by defendant, the jury returned a verdict in favor of plaintiff on 14 December 2000, finding that defendant had breached their agreement by failing to disclose her ownership of the property at or before the time of the Kansas divorce proceeding.¹ Defendant moved for judgment notwithstanding the verdict ("JNOV"). The court denied this JNOV motion. Thereafter, the trial court entered judgment in favor of plaintiff and ordered a public judicial sale of the property with the net proceeds divided equally between the parties. Defendant appeals.

The dispositive issue on appeal is whether the Kansas divorce judgment attempted to determine the title to real property in North Carolina thereby making it unenforceable. For the following reasons, we find that it did.

"Under the provisions of Article IV, § 1 of the United States Constitution it is required that full faith and credit be given to a judgment of a court of another state." *Courtney v. Courtney*, 40 N.C. App. 291, 295, 253 S.E.2d 2, 4 (1979) (citations omitted). However, "[i]t is

1. It appears the trial court only instructed the jury on plaintiff's breach of contract claim based on the following issue presented on the verdict sheet: "Did the Defendant, Joyce Weber, breach the settlement contract by failing to disclose her ownership of the Jackson County real property to the Plaintiff, Larry Buchanan, at or before the time of the divorce proceeding in Kansas in December, 1996?" Plaintiff does not assign error to the court's decision not to instruct the jury on the other claims raised in his complaint or amended complaint.

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accepted law in North Carolina that courts of one state cannot determine title to real property located in another state.” *Kirstein v. Kirstein*, 64 N.C. App. 191, 192, 306 S.E.2d 552, 553 (1983) (citations omitted). When the court rendering judgment has no jurisdiction over the property, the Full Faith and Credit Clause is not applicable. *Id.* at 193, 306 S.E.2d at 553. Thus, “[a] judgment seeking to apportion the rights of the parties to property outside the jurisdiction of the court rendering it may be given extra-state effect for many purposes, but it does not establish any right in the property itself, enforceable in the state of its *situs*.” *McRary v. McRary*, 228 N.C. 714, 718, 47 S.E.2d 27, 30 (1948) (citations omitted).

In the present case, the last sentence in Paragraph 19 of the parties’ agreement states: “This Agreement shall be considered *an instrument of conveyance* of one-half (1/2) interest in such property of the non-owning party hereunder.” (Emphasis added). The Kansas court incorporated the entire agreement, including Paragraph 19, into the parties’ divorce judgment. In doing so, that court directly attempted to determine title to real property located in North Carolina. Since the Kansas court was without jurisdiction over the subject matter, any judgment attempting to affect the title to that subject matter is void and unenforceable whether entered on the merits or by consent of the parties. *See id.* at 719, 47 S.E.2d at 31. Thus, we are not compelled by the Full Faith and Credit Clause to enforce this conveyance.

Nevertheless, plaintiff argues that even if this Court determines that the Kansas divorce judgment did attempt to determine the title to North Carolina real property, the remainder of the judgment should be enforced. Essentially, plaintiff contends that the last sentence in Paragraph 19 could be “severed” to allow sale of the property and an equitable division of the proceeds as per the previous sentences in the paragraph. Plaintiff supports his argument by citing case law which tends to suggest that only those parts of a foreign judgment that attempt to determine ultimate title to North Carolina property are void. *See id.* at 720, 47 S.E.2d at 32 (holding that “[s]o much of the [foreign] judgment as attempts to affect the title to [North Carolina property], . . . is a nullity.”); *Kirstein v. Kirstein*, 64 N.C. App. 191, 193, 306 S.E.2d 552, 553 (1983) (holding “to the extent that the [foreign] decree attempt[s] to affect title to property in North Carolina, it is void.”); *Courtney v. Courtney*, 40 N.C. App. 291, 297, 253 S.E.2d 2, 5 (1979) (holding that “any part of a foreign decree which attempted to determine ultimate title to North Carolina realty [is] void.”).

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Although not specifically addressed previously by the courts of this State, severance of a court judgment appears to be a viable alternative only when that part of the judgment to be severed is separate and distinct from the whole thereby allowing it to be considered independently. *See* 46 Am. Jur. 2d *Judgments* § 22 (1994). Based upon our reading of Paragraph 19, we conclude that the last sentence can be considered independently from the remainder of the sentences in the paragraph so as to effectively allow severance. Severing the sentence would no longer result in the Kansas judgment determining title to North Carolina property. The Kansas court, having *in personam* jurisdiction, could instead require defendant to execute a conveyance or sale of real property in North Carolina. *See Courtney*, 40 N.C. App. at 296, 253 S.E.2d at 4.

Finally, our Supreme Court has held that “[a] marital separation agreement is generally subject to the same rules of law with respect to its enforcement as any other contract.” *Cavanaugh v. Cavanaugh*, 317 N.C. 652, 657, 347 S.E.2d 19, 22-23 (1986) (citing *Moore v. Moore*, 297 N.C. 14, 16, 252 S.E.2d 735, 737 (1979)). However, once an agreement is incorporated into a court judgment, it loses its contractual nature. *Id.* at 659, 347 S.E.2d at 24 (citation omitted). Here, the issue presented to the jury was whether “the Defendant, Joyce Weber, breach[ed] the settlement contract by failing to disclose her ownership of the Jackson County real property to the Plaintiff, Larry Buchanan, at or before the time of the divorce proceeding in Kansas in December, 1996?” Despite the trial court erroneously presenting the jury with an issue that was contractual in nature (considering the parties’ agreement had previously been incorporated into the Kansas divorce judgment), we find that error to be harmless based on the circumstances in this case. The dispositive issue that the jury was asked to determine was whether defendant failed to disclose her ownership of real property located in North Carolina. Since the jury determined that defendant did fail to disclose such ownership, we conclude that the court’s presentation of the issue using contract language was irrelevant. Therefore, we are required to give full faith and credit to the remainder of the Kansas divorce judgment (absent the sentence attempting to determine title to North Carolina property) and the relief granted to plaintiff therein.

Accordingly, for the aforementioned reasons, we remand this case to the trial court to enter a judgment which gives full faith and credit to the remainder of the Kansas divorce judgment that does not determine title to real property in North Carolina.

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[152 N.C. App. 185 (2002)]

Modified and remanded.

Judges WALKER and McGEE concur.



JOE ALLEN EDWARDS, PLAINTIFF v. CORA REBECCA TODD EDWARDS, DEFENDANT

No. COA01-1289

(Filed 6 August 2002)

1. Divorce— equitable distribution—hunting lodge—division of property

In an equitable distribution action in which the marital estate consisted almost entirely of a hunting lodge and surrounding real estate, the trial court did not abuse its discretion by awarding defendant the lodge, which was also her residence, but not the acreage, which defendant considered necessary for the hunting business. There was evidence supporting findings that neither party could buy out the other; it appears from the record that the court sought the highest distributive awards possible.

2. Divorce— equitable distribution—findings—value of property at date of distribution

The trial court erred in an equitable distribution action by not making findings about the value of real property tracts on the date of distribution even though there was evidence that the values changed after the parties separated.

3. Divorce— equitable distribution—valuations of property

The trial court did not err in an equitable distribution action where defendant contended that the court did not accept defendant's valuations of personal property, but comparison of the court's order with defendant's evidence indicates that the court accepted defendant's valuations for many items.

4. Divorce— equitable distribution—post-separation expenses

The trial court did not err in an equitable distribution action by not including defendant's evidence of post-separation expenses where the court rejected defendant's evidence as insufficiently credible.

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[152 N.C. App. 185 (2002)]

Appeal by defendant from judgment entered 14 May 2001 by Judge William M. Cameron, III, in Sampson County District Court. Heard in the Court of Appeals 13 June 2002.

Joe Allen Edwards, pro se, for plaintiff-appellee.

Lea, Clyburn & Rhine, by James W. Lea, III, for defendant-appellant.

MARTIN, Judge.

Plaintiff-husband and defendant-wife were married on 4 July 1965 and separated on 1 August 1996. Plaintiff filed a complaint for absolute divorce on 31 July 1998. Defendant answered and asserted a counterclaim seeking an equitable distribution of the marital estate. By an amended complaint, plaintiff asserted claims for alimony, attorney's fees, and an equitable distribution of the marital property. A judgment of absolute divorce was granted on 27 April 1999, with the remaining issues reserved for further hearing.

The issues of equitable distribution, alimony, and attorneys' fees were heard on 14 August 2000. After hearing evidence, the trial court entered an judgment on 14 May 2001 in which it made findings of fact, denied plaintiff's claim for alimony, determined that an equal distribution of the marital property was not equitable, and distributed 42% of the net marital assets to plaintiff and 58% of the net marital assets to defendant. The trial court denied both parties' requests for attorneys' fees. Defendant gave notice of appeal from the trial court's judgment.

I.

[1] In its order distributing the parties' marital property, the trial court found that the marital estate consisted "almost entirely of a hunting lodge, the surrounding real estate, personal property associated with the lodge and its various activities, and the personal effects and debts of the parties." The trial court distributed the hunting lodge, which is also defendant's residence, and 86.7 acres of land to defendant; the remaining portion of the tract upon which the lodge is located, consisting of 87.3 acres, as well as the remaining land which had been owned by the parties, approximately 264 acres, was distributed to plaintiff. By her first assignment of error, defendant contends the trial court erred when it failed "to make a finding of fact and conclusion of law that [she] was entitled to the amount of acreage necessary to enable her to operate a hunting business"

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In equitable distribution cases, the trial court is vested with “wide discretion.” *Wall v. Wall*, 140 N.C. App. 303, 307, 536 S.E.2d 647, 650 (2000) (citation omitted). Accordingly, the trial court’s judgment “will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). When dividing and distributing marital property, the trial court must order an equal division of property unless it determines that to do so would not be equitable. N.C. Gen. Stat. § 50-20(c). “If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably.” N.C. Gen. Stat. § 50-20(c) (2001). Although the statute enumerates several factors which the court is required to consider in its determination of whether an equal division of the property is or is not equitable division, “the finding of a single distributional factor under N.C. Gen. Stat. § 50-20(c) may support an unequal division.” *Jones v. Jones*, 121 N.C. App. 523, 525, 466 S.E.2d 342, 344, *disc. review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996) (citation omitted).

Without citing any authority, defendant argues that the trial court’s division of the real estate was error because it separated the hunting lodge from the land, in effect preventing either party from owning enough land to operate an income-producing hunting business. However, the trial court made a specific finding explaining why it had divided the real property between the parties rather than leaving it intact:

11. The parties’ primary marital asset is their lodge and land for hunting. Their hunting business was a major focus of both spouses, and the lodge also served as their primary residence. Taken together, the hunting land and lodge has the potential to be a money-making business. However, *neither party has the financial ability to “buy-out” the other party’s share by paying a sizeable distributive award.* Therefore, while economically desirable to keep the land and hunting lodge together, such a division is not possible, and the real estate must be substantially split in order to achieve an equitable distribution (emphasis added).

The trial court noted, in its equitable distribution order, “defendant wife’s request to have additional land distributed to her along with the lodge in order to make hunting feasible is noted but not possible if an equitable division is made.” These findings are supported by the evi-

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dence of the parties' respective earning capacities and their respective existing debt.

In addition, the trial court considered factors set forth in G.S. § 50-20(c) (2001). Relevant to this assignment of error, the trial court specifically considered the non-liquid character of the marital assets. See N.C. Gen. Stat. § 50-20(c)(9) (2001). The trial court found that

the various tracts of land which comprise the marital estate's realty have a much higher value coupled together rather than as individual parts. Their value as hunting parcels is dependent on their cumulative utility as a large combined preserve. Therefore, the court finds that even after dividing the parcels between the parties to effectuate this division, further sale of individual tracts to third parties would likely generate lessened interest and value.

From the record, it appears the trial court endeavored to maximize the economic values of the respective distributive awards to the parties, awarding defendant 58% of the marital property including the lodge and 86.7 acres. We discern no abuse of discretion in the trial court's decision not to award defendant additional acreage and defendant's assignment of error to the contrary is overruled.

II.

[2] Defendant next argues the trial court erred by "failing to consider the date of trial value of all the real property assigned to the parties in its distribution of assets." As a result, she contends, the unequal division in her favor, based upon date of separation values, is in fact an unequal distribution in plaintiff's favor when date of distribution values are considered. Her argument has merit.

In an equitable distribution action, the trial court is required to provide for an equitable distribution of the parties' marital property and divisible property. N.C. Gen. Stat. § 50-20(a). To do so, the court must determine what is marital property and what is divisible property. *Id.* "Marital property" includes "all real and personal property acquired by either or both spouses during the course of the marriage and before the date of separation of the parties, and presently owned" N.C. Gen. Stat. § 50-20(b)(1). "Divisible property" includes, *inter alia*:

All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of sepa-

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ration and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.

N.C. Gen. Stat. § 50-20(b)(4)a. While marital property is valued as of the date of separation, divisible property must be valued as of the date of distribution. N.C. Gen. Stat. § 50-21(b) (2001).

In the present case, the trial court made findings with respect to the value of the real property as of the date of separation, but made no findings with respect to the value of the tracts as of the date of distribution, notwithstanding some evidence that the values had changed. In so doing, the trial court failed to identify and determine the value of the divisible property, i.e., the amount of appreciation or diminution in value, if any, of the marital property from the date of separation to the date of distribution. In the absence of such findings, the trial court could not properly and equitably distribute the divisible property. Accordingly, we must remand this case to the trial court in order that it might properly identify, value, and distribute the parties' divisible property. In so doing, the trial court may find it necessary to revise its order distributing the parties' marital property.

III.

[3] Defendant contends the trial court erred by failing to accept defendant's valuations of personal property owned by the parties. Defendant has cited no authority for this position and has presented no argument other than to state, without support, that the trial court failed to consider her evidence of the values of the parties' personal property. Defendant refers to the spreadsheet exhibit attached to the judgment which contains 395 separate line items, yet she does not specifically mention a single item of personal property which might support her position that the trial court failed to consider her evidence as to value. Nevertheless, our comparison of the values listed in the attachment to the order of equitable distribution with the schedule and testimony offered by defendant indicates that the trial court accepted defendant's valuations for many of the items of personal property. Defendant's assignment of error is overruled.

IV.

[4] By the final assignment of error brought forward on appeal, defendant contends the trial court erred by failing to consider, as a distributional factor, \$374,978.00 in post-separation expenses

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incurred by her. However, the trial court explicitly considered this evidence:

22. c. The defendant wife alleges she has paid or incurred \$374,978 in expenses since the date of separation and this hearing and that such expenses should be considered by the court as a distributional factor. The court finds insufficient credible evidence to support such findings and therefore the court, in it's [sic] discretion, gives no weight to such claim. The court notes that included in this claim is the defendant's specific allegation that she incurred \$83,323.22 in automobile related expenses, which the court finds to be wholly unsupported by any credible evidence.

Contrary to defendant's argument, the trial court considered defendant's evidence of post-separation expenses and rejected it as insufficiently credible to be support for the finding of a distributional factor. Although the trial court is required to consider the distributional factors listed in G.S. § 50-20(c) when distributing marital property, the weight to be given each factor is within the sound discretion of the trial court. *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 545 S.E.2d 788, *affirmed*, 354 N.C. 564, 556 S.E.2d 294 (2001). We discern no abuse of discretion, and this assignment of error is overruled.

Defendant has presented no argument in support of her remaining assignment of error and it is therefore deemed abandoned. N.C.R. App. P. 28(b)(6) (2002). For the reasons stated in Part II above, the equitable distribution order entered in this matter is remanded for further proceedings consistent with this opinion.

Affirmed in part, remanded in part.

Judges TYSON and THOMAS concur.

McCOLL v. ANDERSON

[152 N.C. App. 191 (2002)]

JAMES C. McCOLL, PLAINTIFF V. HENRY L. ANDERSON, JR., AND WIFE, FRANCES W. ANDERSON, DEFENDANTS

No. COA01-1089

(Filed 6 August 2002)

1. Appeal and Error; Easements— appealability—servient holder blocking dominant use—denial of preliminary injunction

An appeal from the denial of a preliminary injunction was dismissed as interlocutory where plaintiffs held an easement across defendants' property for a driveway, defendants built a new driveway without plaintiffs' consent, and plaintiffs sought to prevent the blocking of the original driveway. There is no per se deprivation of a substantial right where the servient estate holder obstructs an easement and it cannot be concluded that these plaintiffs will be irreparably injured pending a determination of the merits.

2. Appeal and Error— appealability—pretrial order—applicable law

An appeal from a pretrial order that the law to be applied upon the trial of an easement dispute was the Restatement of Property was premature where defendants raised defenses that could bar plaintiffs' claim.

Appeal by plaintiff from order entered 30 May 2001 by Judge James L. Baker, Jr. in Watauga County Superior Court. Heard in the Court of Appeals 15 May 2001.

Clement & Yates, by Charles E. Clement; and Moore & Van Allen, PLLC, by George V. Hanna, III, for plaintiff-appellant.

Anderson, Daniel & Coxe, by Bradley A. Coxe; and Di Santi, Watson & Capua, by Anthony S. Di Santi, for defendants-appellees.

WALKER, Judge.

Plaintiff appeals from an order denying his motion for a preliminary injunction. The relevant facts are as follows: Plaintiff and defendants are the owners of adjoining tracts of property located in the Reed Subdivision in Blowing Rock. Pursuant to the deeds within

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the parties respective chains of title, defendants' property is subject to an easement for a driveway which provides plaintiff with access from his property to U.S. Highway 321 (Highway 321). In October of 1999, without plaintiff's consent, defendants constructed a new driveway which provides plaintiff with a different access to Highway 321.

On 3 July 2000, plaintiff initiated this action seeking: (1) an injunction restraining defendants from blocking plaintiff's use of the original driveway, (2) a declaratory judgment declaring that plaintiff, his heirs and assigns have a permanent right to the use and enjoyment of the original driveway and (3) compensatory and punitive damages. Thereafter, plaintiff moved the trial court for a preliminary injunction, enjoining defendants from interfering with his use of the original driveway. In an affidavit attached to the motion, plaintiff stated that the new driveway "increases the risk of collision" when accessing Highway 321 and that during the winter months the new driveway is "dangerous and inconvenient."

After hearing from the parties, the trial court denied plaintiff's request for a preliminary injunction. In its order, the trial court found that plaintiff's property is the dominant estate and that defendant's property is the servient estate. However, it concluded that plaintiff had failed to show a likelihood of success on the merits or that he was likely to sustain irreparable harm unless a preliminary injunction was issued. The trial court further concluded that "[i]n the event this case is submitted to a jury, a portion of the jury instructions shall be based upon the Restatement of Property, 3d, § 4.8(3)."

[1] We first address defendants' motion to dismiss plaintiff's appeal as interlocutory. By order dated 5 March 2002, this Court initially denied defendants' motion; however, for the foregoing reasons, we withdraw said order. "An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995). Generally, there are only two methods by which an interlocutory order may be appealed: (1) certification by the trial court pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), or (2) " 'if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.' " *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) (*quoting Bartlett v. Jacobs*, 124 N.C. App. 521, 524, 477 S.E.2d 693, 695 (1996), *disc. rev. denied*, 345 N.C. 340, 483

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S.E.2d 161 (1997)); *see also* N.C. Gen. Stat. § 1-277(a) and N.C. Gen. Stat. § 7A-27(d)(1) (2001). Here, the parties agree the trial court's order denying plaintiff's request for a preliminary injunction is interlocutory. Additionally, the trial court has not certified the order pursuant to Rule 54(b). Nevertheless, plaintiff contends the order denies him of a substantial right which requires our immediate review.

The "substantial right" test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). Despite the case-by-case approach to the substantial rights test, our Supreme Court has identified two general criteria for determining whether an appeal from an interlocutory order is warranted: (1) "the right itself must be substantial" and (2) "the deprivation of that substantial right must potentially work injury to [the party] if not corrected before appeal from final judgment." *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). Adherence to these criteria promotes the efficient functioning of the appellate process by eliminating "the unnecessary delay and expense of repeated fragmentary appeals" and allowing the presentation of "the whole case for determination in a single appeal . . ." *Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951).

Plaintiff maintains our review of the trial court's order is necessary at this stage because: (1) the location of the new driveway is "neither convenient nor safe" and, consequently, "has caused plaintiff immediate and irreparable injury," and (2) the trial court's conclusion that at trial the jury instructions shall be based upon the Restatement of Property, 3d, § 4.8(3) prevents him from having "a trial in which the trial court is free to apply proper North Carolina law."

Our courts have held that an appeal from an interlocutory order involving access to an easement ordinarily does not implicate a substantial right. *See Pruitt v. Williams*, 288 N.C. 368, 218 S.E.2d 348 (1975); and *Miller v. Swann Plantation Dev. Co.*, 101 N.C. App. 394, 399 S.E.2d 137 (1991). In *Pruitt*, the plaintiffs sought a preliminary and permanent injunction restraining the defendants from obstructing a road over the defendants' property in which the plaintiffs claimed a prescriptive easement. Thereafter, the trial court issued a preliminary injunction ordering the defendants to leave the road unobstructed until a final determination of the action. Our Supreme

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Court found “there is no evidence that shows a reasonable probability that defendants will incur the loss of a substantial right by the granting of the preliminary injunction unless reviewed before final judgment,” and it concluded that the appeal should have been dismissed. *Pruitt*, 288 N.C. at 374, 218 S.E.2d at 352.

In *Miller*, the trial court granted the plaintiff a partial summary judgment entitling him to continue to make use of an easement across the defendant's property. The defendants argued “‘it would seem undeniable’ that an order disposing of one's property rights also affects a substantial right.” This Court disagreed, noting that:

We simply fail to see how defendants' claimed right to hold title to the property free from this encumbrance “will clearly be lost or irretrievably adversely affected” if the order is not reviewed before final judgment. Nothing in the facts indicate that allowing plaintiff use of this easement until final judgment will permanently harm defendants. The record contains no allegations that plaintiff plans to alter or damage the easement, which is the only possible lasting harm we can envision that might occur by waiting. Furthermore, any damage to the easement or defendants' property resulting from plaintiff's use during this period can be rectified later by monetary damages if necessary.

Miller, 101 N.C. App. at 395-96, 399 S.E.2d at 138-39. (citations omitted).

Plaintiff maintains that *Pruitt* and *Miller* are distinguishable from the instant case in light of the fact that in those cases the trial court had issued an interlocutory order in favor of the dominant estate holders and the servient estate holders had appealed. In each case, the trial court's holding was based on the servient estate holders' failure to present sufficient evidence demonstrating how the continued use of the easement pending a final judgment would deprive the dominant estate holders of a substantial right. See *Pruitt*, 288 N.C. at 374, 218 S.E.2d at 352; and *Miller*, 101 N.C. App. at 396, 399 S.E.2d at 139. In contrast, here the trial court issued an interlocutory order in favor of the servient estate holder and the dominant estate holder has appealed.

We reject plaintiff's assertion that where a servient estate holder obstructs an easement, the dominant estate holder has *per se* been deprived of a substantial right. Indeed, the ultimate questions here are: (1) whether plaintiff is deprived of a substantial right by defend-

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ants in denying him use of a particular section of defendants' property to access Highway 321 pending trial, and (2) whether defendants' construction and plaintiff's use of a new driveway injure plaintiff in such a manner as to require this Court's immediate review of the trial court's order.

Based on our careful review of the record, we cannot conclude that plaintiff will be irreparably injured pending a determination of the case on its merits. Furthermore, any damages which plaintiff may incur during this period, by reason of his having to use the new driveway rather than the old driveway, can later be rectified through monetary damages as well as other remedies.

[2] Alternatively, plaintiff maintains the trial court erroneously concluded the Restatement of Property, 3d, § 4.8(3) was the law to be applied upon the trial of the case, thereby irreparably affecting his "right to a trial based on the proper North Carolina law." Our review of the case law indicates that the Restatement of Property, 3d, § 4.8(3) has not been adopted by our courts as controlling authority. *See Hedrick v. Rains*, 344 N.C. 729, 477 S.E.2d 171, 172 (1996) (*per curiam*) ("Except as specifically adopted in this jurisdiction, the Restatement should not be viewed as determinative of North Carolina law"). However, the parties' pleadings show that defendants have raised several affirmative defenses including laches, waiver and estoppel. As defendants' success on any one of these defenses could effectively bar plaintiff's claim, it is premature for us to consider the merits of plaintiff's appeal.

We conclude the trial court's order denying plaintiff's motion for a preliminary injunction does not deprive plaintiff of a substantial right. Defendants' motion to dismiss plaintiff's appeal is granted. We note that plaintiff has petitioned for a writ of certiorari; however, for the reasons stated, we deny the petition. Accordingly, plaintiff's appeal is hereby

Dismissed.

Judges McCULLOUGH and BRYANT concur.

IN RE PINEAULT

[152 N.C. App. 196 (2002)]

IN THE MATTER OF: BRANDON PINEAULT

No. COA01-1152

(Filed 6 August 2002)

1. Juveniles— injury to real property—motion to dismiss—sufficiency of evidence

The trial court did not err by denying respondent juvenile's motion to dismiss the charge of injury to real property based on his kicking a door at school that caused damage to a wall, because there was sufficient evidence that respondent willfully and wantonly kicked the door which caused the damage.

2. Juveniles— disorderly conduct—motion to dismiss—sufficiency of evidence

The trial court did not err by denying respondent juvenile's motion to dismiss two charges of disorderly conduct based on his use of foul language in the classroom on 6 February 2001 and his behavior in the classroom and first aid room on 7 February 2001, because there was sufficient evidence that respondent's behavior interfered with the operation of the school including the nature and severity of respondent's language coupled with the fact that several school officials stopped teaching and performing various administrative duties to attend to respondent.

Appeal by juvenile from orders entered 23 March 2001 by Judge Spencer G. Key, Jr. in Stokes County District Court. Heard in the Court of Appeals 11 June 2002.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Susan K. Nichols, for petitioner-appellee.

R. Michael Bruce for respondent-appellant.

HUNTER, Judge.

Brandon Pineault ("respondent") was adjudicated delinquent in the district court of Stokes County based upon violations of N.C. Gen. Stat. § 14-127 (2001), prohibiting injury to real property, and two counts of disorderly conduct in school pursuant to N.C. Gen. Stat. § 14-288.4(a)(6) (2001). We affirm.

Evidence at trial tended to establish that on 6 February 2001, respondent was a student at Piney Grove Middle School. Christine

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Carlson was the teacher at the time. On this day, Ms. Carlson was teaching mapping skills when she heard respondent tell another student, “[f]—k you.” Ms. Carlson escorted respondent to the principal’s office. On the way to the office, respondent said, “[f]—k you, b—h.”

Ms. Carlson testified that on the following day, 7 February 2001, while she was on the phone with a parent, respondent began arguing with another student. Ms. Carlson’s teacher’s assistant attempted to resolve the situation. At that time, Ms. Carlson heard respondent say “[f]—k off, bastard” to the other student. Ms. Carlson escorted respondent to the principal’s office. According to the testimony of Principal Roger Lee Tucker, respondent was detained in the first aid room because he was acting disorderly and the assistant principal and teachers were attempting to calm him down. Mr. Tucker instructed respondent to enter his office and respondent refused. Mr. Tucker then restrained respondent by holding him by his “trunk” and pinning his arms down to carry him into his office. While restrained, respondent began kicking, and eventually kicked a door, pushing the doorstep through the wall.

At the time of the hearing, respondent was thirteen years old. At the close of the evidence, respondent moved to dismiss the charges, which motion was denied. Respondent was given a curfew, placed on probation for a period of twelve months, ordered to undergo testing for alcohol and controlled substances, cooperate with residential and non-residential treatment programs, perform up to twenty hours of community service, submit to substance abuse monitoring, and participate in a life and educational skills program.

Respondent assigns four errors to the trial court’s rulings: (1) the trial court erred in denying respondent’s motion to dismiss the charge of injury to real property; (2) the charge of injury to real property was not proven beyond a reasonable doubt; (3) the trial court erred in denying respondent’s motion to dismiss the two charges of disorderly conduct; and (4) the trial court erred in finding that the charges of disorderly conduct were proven beyond a reasonable doubt.

I.

[1] Respondent argues that the trial court erred in denying his motion to dismiss the charge of injury to real property for lack of sufficient evidence. Specifically, he asserts the State failed to prove

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beyond a reasonable doubt that he willfully and wantonly damaged the property. We disagree.

It is well-settled that “in order to withstand a motion to dismiss the charges contained in a juvenile petition, there must be substantial evidence of each of the material elements of the offense charged.” *In re Bass*, 77 N.C. App. 110, 115, 334 S.E.2d 779, 782 (1985). The evidence must be considered in the light most favorable to the State, and the State is entitled to receive every reasonable inference of fact that may be drawn from the evidence. *State v. Easterling*, 300 N.C. 594, 604, 268 S.E.2d 800, 807 (1980).

N.C. Gen. Stat. § 14-127 provides that “[i]f any person shall willfully and wantonly damage, injure or destroy any real property whatsoever, either of a public or private nature, he shall be guilty of a Class 1 misdemeanor.” *Id.* Respondent, in his brief, argues that there was no direct evidence of his intention to purposely and deliberately kick the door. We find there was sufficient evidence.

The term ““willful” as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of the law.” *State v. Brackett*, 306 N.C. 138, 142, 291 S.E.2d 660, 662 (1982) (citation omitted). “‘Willfulness’ is a state of mind which is seldom capable of direct proof, but which must be inferred from the circumstances of the particular case.” *State v. Davis*, 86 N.C. App. 25, 30, 356 S.E.2d 607, 610 (1987). “Further, a person is presumed to intend the natural and foreseeable consequences of his unlawful acts.” *Id.* at 30, 356 S.E.2d at 610.

Here, the State presented evidence that respondent “was being very belligerent, uncooperative,” and “disruptive.” Respondent kicked “indiscriminately” down the hall while being restrained. He kicked the door with such force as to cause the doorstep to punch a hole in the wall. Damage to the wall was a natural and foreseeable consequence of respondent kicking wildly down the hall. In viewing the evidence in the light most favorable to the State, we find there was sufficient evidence that respondent willfully and wantonly kicked the door which caused the damage. Therefore, we conclude respondent’s motion to dismiss was properly denied.

II.

[2] Respondent next argues the trial court erred in finding the offenses of disorderly conduct had been proven beyond a reasonable

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doubt. We disagree. Respondent was charged with two counts of disorderly conduct. The first count was based on his use of foul language in the classroom on 6 February 2001; the second count stems from his behavior in the classroom and first aid room on 7 February 2001.

N.C. Gen. Stat. § 14-288.4(a)(6) prohibits the following:

(a) Disorderly conduct is a public disturbance intentionally caused by any person who:

...

- (6) Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.

N.C. Gen. Stat. § 14-288.4(a)(6). Our Supreme Court has held that the conduct must cause “a substantial interference with, disruption of and confusion of the operation of the school in its program of instruction and training of students there enrolled.” *State v. Wiggins*, 272 N.C. 147, 154, 158 S.E.2d 37, 42 (1967); *see also, In re Eller*, 331 N.C. 714, 417 S.E.2d 479 (1992).

As to the first count, Ms. Carlson testified that while teaching mapping skills to her class on 6 February 2001, she heard respondent state, in a loud, angry voice, “[f]—k you.” Ms. Carlson was required to stop teaching the class and escort respondent to the principal’s office. As Ms. Carlson escorted respondent out of her classroom, he twice said to her, “[f]—k you, b—h,” evincing a clear disrespect for her authority. While the record does not indicate how long Ms. Carlson was away from the classroom, it does establish that she escorted respondent to the principal’s office and explained to office staff what had happened, thereby indicating she was away from the classroom for more than several minutes. We hold, given the severity and nature of respondent’s language, coupled with the fact that Ms. Carlson was required to stop teaching her class for at least several minutes, that respondent’s actions substantially interfered with the operation of Ms. Carlson’s classroom in the manner contemplated in *Wiggins*.

As to the second count of disorderly conduct, the State presented evidence that respondent began arguing with another student while Ms. Carlson was on the telephone talking to a parent. He used pro-

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fanity towards another student and was taken to the principal's office. According to the testimony of the principal, respondent was detained in the first aid room "because he was being disorderly and the assistant principal and the teachers w[ere] with him trying to calm him down." Further, he testified that respondent "was being very belligerent, uncooperative with my teachers, would not cooperate with me, would not come into my office calmly, jerked away from me, pulled away, [and] was being very disruptive." The extent of respondent's disruptive behavior is further evidenced by the fact that respondent's conduct required restraint by the principal. Moreover, his behavior required the attention of several school officials including the principal, teachers, and the assistant principal. As a consequence of respondent's behavior, these officials stopped teaching and performing various administrative duties to attend to him. Thus, we conclude that the evidence, viewed in the light most favorable to the State, was sufficient to establish that respondent's conduct substantially interfered with the operation of the school.¹ The trial court did not err in determining that respondent's behavior on both occasions constituted a violation of N.C. Gen. Stat. § 14-288.4(a)(6).

Affirmed.

Judges GREENE and TIMMONS-GOODSON concur.

JUSTIN MICHAEL CREEL, BY AND THROUGH HIS GUARDIAN AD LITEM, VICTOR H. MORGAN, JR., PLAINTIFF V. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, EMPLOYER, DEFENDANT

No. COA01-1058

(Filed 6 August 2002)

**Tort Claims Act— negligent acts of licensed foster parents—
respondent superior—lack of jurisdiction**

The Industrial Commission did not err by dismissing based on lack of jurisdiction a case concluding that the North Carolina Department of Health and Human Services (DHHS) may not be

1. While this Court recently held that "a student who talked during a test, slammed a door, and begged a teacher in the hallway that he not be sent to the office," causing the teacher to be away from her classroom for "several" minutes did not amount to a "substantial interference with the operation of the school," *In re Brown*,

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held liable under the Tort Claims Act for the alleged negligent acts of licensed foster parents under the doctrine of respondeat superior, because: (1) no employment relationship existed between the foster parents and DHHS, meaning the doctrine of respondeat superior cannot be applied to hold DHHS vicariously liable for the acts of the foster parents; and (2) there is no need to address the degree of control and supervision that DHHS maintained over the manner in which the details of the work performed by the foster parents was executed since it is undisputed that no employment relationship existed between the parties.

Appeal by plaintiff from an order entered 18 June 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 May 2002.

Brumbaugh, Mu & King, P.A., by Richard A. Mu, for plaintiff-appellant.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Grady L. Balentine, Jr., for defendant-appellee.

HUNTER, Judge.

The issue presented by this case is whether, pursuant to the doctrine of *respondeat superior*, the North Carolina Department of Health and Human Services ("DHHS") may be held liable under the Tort Claims Act for the alleged negligent acts of licensed foster parents. The Industrial Commission answered the question in the negative. We affirm.

I. Facts and Procedural History

Burnest and Rita Gamble are licensed foster parents. Justin Michael Creel ("the child") was placed by the state with the Gambles on 21 October 1996. On 17 March 1997, while under the foster care of the Gambles, the child was seriously injured by a lawnmower operated by Mr. Gamble. The child, through his guardian *ad litem*, Victor H. Morgan, Jr. ("the claimant"), instituted this action against DHHS pursuant to the Tort Claims Act, N.C. Gen. Stat. §§ 143-291 to -300.1

150 N.C. App. 127, 131, 562 S.E.2d 583, 586 (2002), this case is distinguishable. In *Brown*, the respondent's conduct occurred during an examination and at the end of the examination, not while the teacher was conducting class as in the case *sub judice*. See *id.* at 127-28, 562 S.E.2d at 584. Moreover, in *Brown*, neither the respondent's language nor his behavior was as egregious or severe as respondent's language in this case. Accordingly, *Brown* is not controlling here.

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(2001). The "Claim for Damages Under Tort Claims Act" ("the Claim") alleges that the Gambles were agents of DHHS at the time of the accident and that the child's injuries arose as a result of the negligence of the Gambles while acting within the scope of their agency. On this basis, the Claim alleges that DHHS should be held liable for the Gambles' alleged negligence under the doctrine of *respondeat superior*, and that the claimant is entitled to compensatory damages in the amount of \$150,000.00. DHHS answered and denied liability.

The parties stipulated to a bifurcated proceeding, with the issues of jurisdiction and negligence to be determined first, followed by a determination of damages if necessary. Deputy Commissioner Morgan S. Chapman dismissed the claim for lack of jurisdiction based upon the determination that the Gambles were not agents of DHHS and that the claim therefore did not fall under the Tort Claims Act and the Industrial Commission did not have jurisdiction. The claimant appealed, and the Full Commission entered an order affirming the dismissal. The claimant appeals to this Court.

II. Analysis

Pursuant to the Tort Claims Act, the state (or an agency of the state such as DHHS) may be sued directly in tort if (1) the "claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority," and (2) the claim arose "under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina." N.C. Gen. Stat. § 143-291(a); *Gammons v. N.C. Dept. of Human Resources*, 344 N.C. 51, 54, 472 S.E.2d 722, 724 (1996). Here, the claimant does not contend that the Gambles were officers, employees, or involuntary servants of DHHS; rather, the claimant specifically alleges that the Gambles were "agents" of DHHS.

Generally, liability of a principal for the torts of his agent may arise in three situations: (1) when the agent's act is expressly authorized by the principal; (2) when the agent's act is ratified by the principal; or (3) when the agent's act is committed within the scope of his employment and in furtherance of the principal's business. *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 491, 340 S.E.2d 116, 121, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). In the first two of these three situations, liability is based upon traditional agency principles; in the third of these three situations, liability is

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based upon the doctrine of *respondeat superior*. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 70, at 502 (5th ed. 1984) (hereinafter *Prosser*); 27 Am. Jur. 2d *Employment Relationships* §§ 459-60, 896-98 (1996). Here, the claimant specifically contends that DHHS should be held liable based upon the doctrine of *respondeat superior*; the claimant does not argue that DHHS should be held liable based upon traditional agency principles.¹ Thus, we limit our analysis to whether DHHS should be held liable under the doctrine of *respondeat superior*. In analyzing a claim pursuant to the Tort Claims Act, we are mindful that the Act is in derogation of the state's sovereign right to be immune from suit, and that, therefore, the Act should be strictly construed. See *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997).

As noted above, the Claim here is based upon the specific theory that the Gambles were "agents" of the state and that DHHS may be held vicariously liable for their alleged negligent acts based upon the doctrine of *respondeat superior*. The doctrine of *respondeat superior* generally allows an employer (sometimes referred to as a "principal" in this context) to be held vicariously liable for tortious acts committed by an employee (sometimes referred to as an "agent" in this context) acting within the scope of his employment. See Charles E. Daye and Mark W. Morris, *North Carolina Law of Torts* § 23.20, at 454 (2d. ed. 1999) (hereinafter *North Carolina Law of Torts*). Fundamental to the application of the doctrine of *respondeat superior* is the requirement that there be an employer-employee relationship between the parties. See *North Carolina Law of Torts* § 23.20, at 455; *Prosser* § 70, at 501; 27 Am. Jur. 2d *Employment Relationships* § 461.

Here, it is undisputed that no employment relationship existed between the Gambles and DHHS. The Commission found as fact that "[t]he Gambles volunteered to serve as foster parents" and that "[t]hey were not paid for their efforts but received a sum from the county each month to pay the expenses associated with keeping a

1. We note that, even if the claimant had argued that DHHS should be held liable based upon traditional agency principles, such argument would be without merit. Under the law of agency, a "principal" and an "agent" may agree to establish a fiduciary relationship whereby the principal grants authority to the agent to represent the principal and act on his behalf. See 3 Am. Jur. 2d *Agency* § 1 (1996). Once an agency relationship exists, the principal may be held liable for the agent's tortious act if it was authorized or ratified by the principal. See 3 Am. Jur. 2d *Agency* § 262-63. Here, there is no evidence in the record tending to show that there existed an agency relationship between the Gambles and DHHS, or that, even if such a relationship existed, the alleged negligent acts in question were either authorized or ratified by DHHS.

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child, including food, housing, clothing, and toys." The claimant has not assigned error to these findings, and they are therefore binding on appeal. *Long v. Morganton Dyeing & Finishing Co.*, 321 N.C. 82, 84, 361 S.E.2d 575, 577 (1987). As there is no dispute that an employment relationship did not exist, the doctrine of *respondeat superior* cannot be applied to hold DHHS vicariously liable for the acts of the Gambles.

In his brief, the claimant fails to address the fact that the Gambles were not employees of DHHS. Instead, the claimant argues that the Gambles were agents of DHHS "because [DHHS] exercised complete control and supervision over" the Gambles' foster care of the claimant. This argument is misplaced. The degree of control and supervision retained by one party over the details of the work to be performed by a second party is relevant to determining whether that second party may be categorized as an "employee" or, in the alternative, an "independent contractor." See *Hayes v. Elon College*, 224 N.C. 11, 15, 29 S.E.2d 137, 139-40 (1944) (cited in *Vaughn v. Dept. of Human Resources*, 296 N.C. 683, 686, 252 S.E.2d 792, 795 (1979)); see also *North Carolina Law of Torts* § 23.20, at 454. This distinction takes on significance in certain cases because an employer may be held vicariously liable under the doctrine of *respondeat superior* for a tortious act committed by an "employee" but not for a tortious act committed by an "independent contractor." See *Vaughn*, 296 N.C. at 686, 252 S.E.2d at 795; see also *North Carolina Law of Torts* § 23.20, at 454; *Prosser* § 71, at 509. However, the distinction is not significant where, as in the present case, it is undisputed that no employment relationship exists between the parties; in such situations, the second party is neither an "employee" nor an "independent contractor." Thus, there is no need in the present case to address the degree of control and supervision that DHHS maintained over the manner in which the details of the work performed by the Gambles as foster parents were to be executed.

Based upon existing law, we conclude that the doctrine of *respondeat superior* is not applicable here, and that, as a result, the Commission was without jurisdiction to hear this claim seeking to hold DHHS liable under the Tort Claims Act for the alleged negligent acts of the Gambles.² For the reasons stated herein, we affirm the Industrial Commission's dismissal for lack of jurisdiction.

2. Several states have enacted legislation to indemnify foster parents as employees of the state. For example, Illinois explicitly includes as employees under their State Employee Indemnification Act "foster parents . . . when caring for a Department ward." 5 Ill. Comp. Stat. Ann. 350/1(b) (West 2002).

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Affirmed.

Judges WYNN and CAMPBELL concur.

PHILLIP MURPHY v. FIRST UNION CAPITAL MARKETS CORPORATION, WHEAT
FIRST SECURITIES, INC. AND FIRST UNION CORPORATION

No. COA01-966

(Filed 6 August 2002)

1. Employer and Employee— failure to pay stock bonus—forfeiture based on leaving company—written notice

The trial court erred by granting summary judgment in favor of plaintiff and by denying defendants' summary judgment motion on the issue of whether N.C.G.S. § 95-25.8 was violated when defendants forfeited part of plaintiff's bonus in the form of stock when he left to work elsewhere, because: (1) plaintiff's bonus is a wage under N.C.G.S. § 95-25.2(16), and the Wage and Hour Act under N.C.G.S. § 95-25.7 expressly provides for forfeiture of earned bonuses; (2) plaintiff was notified in writing of the changes to employee benefits prior to the implementation of a mandatory stock plan including that 75% of his bonus would be paid in cash and that the remaining 25% plus a 50% premium would be paid as stock as long as he remained with the corporation for at least three additional years; and (3) plaintiff was notified that if he quit his job, he would forfeit the 25% set aside.

2. Employer and Employee— failure to pay stock bonus—forfeiture based on leaving company

The trial court erred by granting summary judgment in favor of plaintiff for an alleged violation of N.C.G.S. § 95-25.6 for failure to pay plaintiff his stock bonus that defendant claimed plaintiff forfeited by leaving the company, because: (1) defendant informed plaintiff by letter that he would receive his bonus on 15 February 1998, and plaintiff received \$900,000 in cash and \$300,000 in restricted stock although the stock portion had not yet vested; and (2) plaintiff was informed about the plan in advance of receiving the bonus, and therefore there was no violation of the statute.

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3. Damages and Remedies— liquidated damages—failure to pay stock bonus

Although plaintiff contends the trial court erred by failing to award him liquidated damages under N.C.G.S. § 95-25.22(a1) based on defendants' failure to pay plaintiff his stock bonus when plaintiff left the company, this issue is not addressed based on the Court of Appeals' holding in the case.

Appeal by plaintiff and defendants from judgment entered 20 April 2001 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 April 2002.

Mitchell, Rallings & Tissue, PLLC, by C. Spencer Atridge, II for plaintiff-appellee.

Robinson, Bradshaw & Hinson, PA, by Charles E. Johnson and Angelique R. Vincent for defendants-appellants.

THOMAS, Judge.

Defendants, First Union Capital Markets Corporation (FUCMC), Wheat First Securities, Inc. (WFS), and First Union Corporation (First Union), appeal from a grant of summary judgment on plaintiff's claim that they improperly withheld part of his bonus. Plaintiff, Phillip Murphy, appeals from a denial of liquidated damages.

For reasons discussed herein, we reverse and remand.

The relevant facts are as follows: Plaintiff was employed by First Union on 29 March 1993. Between then and when he resigned 21 May 1998, plaintiff worked for First Union or its subsidiaries, FUCMC and WFS.

During 1996, plaintiff earned a one million dollar bonus, which was paid to him in its entirety. By the beginning of 1997, however, First Union developed a Premium Stock Deferral Plan (Plan), in which a portion of employees' bonuses would be converted into restricted shares of First Union stock. Those shares vested after three years of additional employment. First Union would then add a 50% premium to the deferral. Plaintiff, however, stated he did not want to participate in the Plan and never signed any consenting document. Plaintiff's bonus for 1997 was \$1.2 million. He was paid \$900,000 on 15 February 1998, with \$300,000 placed in the Plan.

Plaintiff was allegedly told by his immediate supervisor, Steven Kohlhagan, that if plaintiff were to leave First Union, plaintiff would

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receive all money withheld through the plan but would not receive any of First Union's contributions. Nevertheless, under the Plan's terms, if plaintiff were to voluntarily terminate his employment with First Union, FUCMC, or WFS, prior to the vesting of the stock for any reason other than death or retirement, he would forfeit the full amount of what had been placed in the Plan.

Plaintiff refused to sign an authorization for his participation in the Plan but was then informed by his supervisors that he had no choice—the Plan was going into effect and his compensation would be paid accordingly.

Plaintiff resigned from First Union on 21 May 1998 and accepted a similar position with NationsBank. Despite repeated demands, defendants refused to pay the \$300,000 which had been placed in the Plan. Plaintiff filed a complaint, alleging: (1) improper wage withholding; (2) violation of N.C. Gen. Stat. § 95-25.6; (3) civil conversion; (4) breach of contract; (5) detrimental reliance; and (6) civil conspiracy. Plaintiff requested liquidated and punitive damages.

Both parties filed summary judgment motions. The trial court granted partial summary judgment to plaintiff for: (a) improper wage withholding; (b) violation of section 95-25.6; and (c) parent liability of First Union for wage violations by FUCMC and WFS. The trial court granted defendant's summary judgment motion as to plaintiff's claims for: (1) civil conversion; (2) punitive damages; (3) breach of contract; (4) detrimental reliance; and (5) civil conspiracy. Additionally, the trial court allowed plaintiff's motion for interest pursuant to section 95-25.22(a), denied plaintiff's motion for liquidated damages, and deferred and reserved plaintiff's motion for costs and attorney fees. Pursuant to Rule 54 of the North Carolina Rules of Civil Procedure, the trial court certified the judgment for immediate appeal.

Before we consider defendants' arguments, we note the trial court's order would not normally be immediately appealable because it would be considered interlocutory. *State ex rel. Employment Security Commission v. IATSE Local 574*, 114 N.C. App. 662, 663, 442 S.E.2d 339, 340 (1994). A ruling is interlocutory if it does not determine the issues but directs some further proceeding preliminary to a final decree. *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983). However, an interlocutory order may be heard in appellate courts if it affects a substantial right. *See* N.C. Gen. Stat. § 1-277(a) (1999). In the instant case, there are factual claims common to the appealed claim and the remaining claims,

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including defendants' counterclaims against plaintiff. An appellant has a substantial right to avoid two trials on the same question. *See Davidson v. Knauff*, 93 N.C. App. 20, 24-27, 376 S.E.2d 488, 490-92, *rev. denied*, 324 N.C. 577, 381 S.E.2d 772 (1989). We therefore consider the appeal.

[1] By defendants' first assignment of error, they initially argue the trial court erred in granting summary judgment to plaintiff on the issue of whether section 95-25.8 was violated because plaintiff's bonus is not a wage.

The Wage and Hour Act defines "wage" as:

compensation for labor or services rendered by an employee whether determined on a time, task, piece, job, day, commission, or other basis of calculation . . . For the purposes of G.S. 95-25.6 through 95-25.13 "wage" includes sick pay, vacation pay, severance pay, commissions, *bonuses*, and other amounts promised when the employer has a policy or practice of making such payments.

N.C. Gen. Stat. § 95-25.2(16) (1999) (Emphasis added).

Defendants contend the part of the bonus placed in the Plan is not a wage because it has not yet vested. Therefore, it is not the property of the employee. Under the Plan, 25% of the bonus must be deferred into the stock plan. After three years, the stock benefit vests. Nonetheless, nothing in the N.C. Wage and Hour Act limits a wage to that which is vested. Under section 95-25.2(16), the bonus is a promised amount that an employer has a practice of disbursing. The bonus at issue satisfies this definition. We therefore hold that plaintiff's bonus, including that part put in the Plan, was indeed a wage under section 95-25.2(16).

Defendants further argue, however, that plaintiff should be estopped from prevailing on his claim because the Wage and Hour Act expressly provides for forfeiture of earned bonuses. We agree.

Defendants contend plaintiff was put on notice that part of his bonus would be diverted into a mandatory stock plan. North Carolina's Wage and Hour Act, section 95-25.7 provides, in pertinent part, that:

Wages based on bonuses, commissions or other forms of calculation shall be paid on the first regular payday after the amount

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becomes calculable when a separation occurs. Such wages may not be forfeited unless the employee has been notified in accordance with G.S. 95-25.13 of the employer's policy or practice which results in forfeiture. Employees not so notified are not subject to such loss or forfeiture.

N.C. Gen. Stat. § 95-25.7 (2001). Section 95-25.13, provides in pertinent part, that an employer must:

Notify its employees, in writing or through a posted notice maintained in a place accessible to its employees, of any changes in promised wages prior to the time of such changes except that wages may be retroactively increased without the prior notice required by this subsection[.]

N.C. Gen. Stat. § 95-25.13(3) (2001).

The evidence shows that plaintiff was notified in writing that 75% of his bonus would be paid in cash. The remaining 25%, plus a 50% premium, would be paid as stock as long as he remained with the corporation for at least three additional years. Plaintiff was clearly notified that if he quit his job, he would forfeit the 25% set aside.

The forfeiture provision of Chapter 95 has been construed by this Court "to permit an employer to make changes in an employee's benefits, but the change applies only to those benefits accruing after written notice is given the employee or notice is posted in a place accessible to the employees." *McCullough v. Branch Banking & Trust Co., Inc.*, 136 N.C. App. 340, 349, 524 S.E.2d 569, 575 (2000). As defendants notified plaintiff in writing of the changes to employee benefits prior to the implementation of the Plan, they did not violate the Wage and Hour Act by forfeiting plaintiff's stock when he left to work elsewhere.

Accordingly, we hold that although plaintiff's bonus is a wage under section 95-25.2(16), it was properly forfeited under section 95-25.7. We therefore reverse the trial court's grant of summary judgment and hold that the trial court should have granted summary judgment in favor of defendants on this issue. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001).

[2] By defendants' second assignment of error, they argue the trial court erred in granting summary judgment to plaintiff for violation of section 95-25.6. We agree.

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Section 95-25.6 states that:

Every employer shall pay every employee all wages and tips accruing to the employee on the regular payday. Pay periods may be daily, weekly, bi-weekly, semi-monthly, or monthly. *Wages based upon bonuses, commissions, or other forms of calculation may be paid as infrequently as annually if prescribed in advance.*

N.C. Gen. Stat. § 95-25.6 (2001) (Emphasis added). Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c).

Here, First Union informed plaintiff by letter that he would receive his bonus on 15 February 1998, the regularly scheduled payday. On that date, plaintiff received \$900,000 in cash and \$300,000 in restricted stock, although the stock portion had not yet vested. Plaintiff was informed about the plan in advance of receiving the bonus. As with section 95-25.7, we do not find that section 95-25.6 was violated. Plaintiff’s summary judgment motion should not have been granted.

[3] By plaintiff’s only assignment of error, he argues the trial court erred in failing to award him liquidated damages pursuant to N.C. Gen. Stat. § 95-25.22(a1). We do not address this issue because of our aforementioned holdings.

Accordingly, we hold that the trial court improperly granted plaintiff’s summary judgment and improperly denied summary judgment in favor of defendants. We remand this case to the trial court for an entry of judgment consistent with this opinion.

REVERSED AND REMANDED.

Judges MARTIN and TYSON concur.

STATE v. CRAYCRAFT

[152 N.C. App. 211 (2002)]

STATE OF NORTH CAROLINA v. MARK LYNN CRAYCRAFT

No. COA01-1084

(Filed 6 August 2002)

1. Larceny— fatal variance in indictment—property of evicted tenant stolen—no possessory interest in landlord

The trial court erred by not dismissing a felony larceny charge for a fatal variance between the indictment and the evidence where the indictment alleged that defendant had taken items belonging to the landlord of a mobile home from which defendant's father had been evicted, but the evidence was that the items belonged to defendant's father. No civil ejectment documents were introduced into evidence and the landlord did not have any special possessory interest in the items, although he was maintaining them for his former tenant.

2. Burglary and Unlawful Breaking or Entering— underlying larceny charge dismissed—no evidence of intent—misdemeanor breaking or entering

A conviction for felonious breaking or entering could not stand where defendant's felonious larceny charge should have been dismissed and the State presented no evidence that defendant entered the mobile home with the intent to commit a felony or larceny. The case was remanded for sentencing for misdemeanor breaking or entering.

3. Sentencing— restitution—ownership of stolen items

The trial court erred in part by ordering restitution from a defendant who broke into a trailer from which his father had been ejected and took a table and chairs. The table and chairs did not belong to the landlord and he was not the aggrieved party to be compensated for the loss. However, the amount attributable to damage to the mobile home was proper.

Appeal by defendant from judgments entered 15 March 2000 by Judge Orlando Hudson in Wake County Superior Court. Heard in the Court of Appeals 16 May 2002.

Attorney General Roy A. Cooper, by William M. Polk, for the State.

John T. Hall for defendant.

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TIMMONS-GOODSON, Judge.

On 15 March 2000, a jury found Mark Lynn Craycraft (“defendant”) guilty of felony breaking and entering and felony larceny. For the reasons stated herein, we reverse the judgment of the trial court.

At trial the State presented evidence tending to show the following: Defendant’s father rented a mobile home from Joe Montague (“Montague”) until he defaulted on his rental payments. Montague explained that he took steps to evict defendant’s father for failure to pay rent; however, no civil ejectment documents were offered into evidence. Montague stated that he, “gave [defendant’s father] seven days to get his stuff out or the place would be locked up. He didn’t do that. Sheriff came out, went down, put the signs in the windows and we changed the locks on the doors” to secure the mobile home. Defendant’s father thereafter contacted Montague in his attempts to retrieve his property from the mobile home. Montague testified:

[Defendant’s father] called out there 20 minutes to seven on a Friday night and wanted to know would we come go down there and unlock his trailer for him and get his stuff out. He was going to go and rent a U-Haul truck. And I said well when you get here with the truck we’ll call the law. Now if it’s after 7:00 I’ll be gone. So never heard nothing else from him.

About two weeks later he called me again and asked about the same thing. . . . Never heard another word with him. He never came back with the truck and never came back to my knowledge.

The State presented further evidence by Yvonne DeBord Driver (“Driver”), an employee of Montague, who testified that on 1 November 1998, she saw “that somebody had broke [sic] into the mobile home and that the table was gone.” After calling Montague to inform him of the break-in, she resecured the mobile home. At that point, she observed defendant on a path behind the mobile home. The next day, Driver encountered defendant riding a bicycle on the property. She returned to the office and informed Montague’s wife that she had seen defendant. Mrs. Montague followed defendant out of the mobile home park and down the road to another mobile home, the backyard of which abutted the rear of defendant’s father’s former mobile home. Driver subsequently identified defendant to sheriff’s deputies who arrested him. At the close of the State’s evidence, defendant made a motion to dismiss based on the insufficiency of the

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evidence which was denied. Defendant then presented evidence tending to show an alibi.

The trial court sentenced defendant to suspended consecutive sentences of eight to ten months, with supervised probation for thirty-six (36) months, and ordered defendant to pay restitution in the amount of \$400.00 for the table and chairs and \$150.00 to compensate for the damage to the mobile home. From this sentence, defendant appeals.

Defendant presents two issues on appeal: (1) whether the trial court erred in denying the motion to dismiss the charge of felony larceny and (2) whether the trial court erred in ordering defendant to pay restitution to Montague.

On a motion to dismiss, the trial court must consider the evidence “in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom.” *State v. Gainey*, 343 N.C. 79, 85, 468 S.E.2d 227, 231 (1996). “In ruling on a motion to dismiss, the trial court need only determine whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator.” *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998), *cert. denied*, 122 S. Ct. 628, 151 L. Ed. 2d 548 (2001). Evidence is considered substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The motion to dismiss should be denied if there is substantial evidence supporting a finding that the offense charged was committed. *See State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

[1] Defendant argues that the trial court erred in failing to dismiss the felony larceny charge because of the existence of a fatal variance between the indictment and the evidence at trial. We agree.

In a larceny case, the indictment must allege that the person from whom the property was taken had a property interest in the stolen property. *State v. Greene*, 289 N.C. 578, 584, 223 S.E.2d 365, 369 (1976). The State may prove ownership by introducing evidence that the person either possessed title to the property or had a special property interest. *Id.* If the indictment fails to allege the existence of a person with title or special property interest, then the indictment contains a fatal variance. *State v. Salters*, 137 N.C. App. 553, 555, 528 S.E.2d 386, 389 (2000), *cert. denied*, 352 N.C. 361, 544 S.E.2d 556 (2000).

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In the instant case, the evidence showed that the table and chairs were the personal property of defendant's father. No evidence was presented to show that they belonged to Montague as alleged in the indictment. On the contrary, Montague testified that the table and chairs belonged to defendant's father. Defendant's father made two separate unsuccessful attempts to collect his property from Montague. As a landlord, Montague did not have any special possessory interest in the table and chairs, although he was maintaining them for his former tenant, pursuant to sections 42-25.9 and 42-36.2 of the North Carolina General Statutes. *See* N.C. Gen. Stat. § 42-25.9(g) (2001) (stating that a landlord may dispose of former tenant's personal property after being placed in lawful possession by execution of a writ of possession) and N.C. Gen. Stat. § 42-36.2 (2001) (pertaining to storage of evicted tenant's personal property). Given the absence of civil ejectment documents, the record lacks substantial evidence that defendant's father had been evicted. Moreover, although under section 42-25.9(g) "[t]en days after being placed in lawful possession by execution of a writ of possession, a landlord may throw away, dispose of, or sell all items of personal property," there was no evidence that Montague had obtained a writ of possession. N.C. Gen. Stat. § 42-25.9(g). Even if the record contained civil ejectment documents, a landlord does not have special possessory interest in tenant's personalty, the way that, for example, a parent does over their child's possessions, *see State v. Robinette*, 33 N.C. App. 42, 46, 234 S.E.2d 28, 30 (1977), or a bailee does, *see State v. Liddell*, 39 N.C. App. 373, 375, 250 S.E.2d 77, 79 (1979), *cert. denied*, 297 N.C. 178, 254 S.E.2d 36 (1979). Furthermore, even a caretaker in actual possession does not have a special interest in the property. *See Salters*, 137 N.C. App. at 556, 528 S.E.2d at 389.

As there was insufficient evidence that Montague had any possessory interest in the table and chairs, the indictment contained a fatal variance. Because of the fatal variance between the indictment and the evidence, we conclude that the trial court erred in denying defendant's motion to dismiss the charge of felony larceny.

[2] Given our conclusion that the trial court erred in denying defendant's motion to dismiss the charge of felony larceny, defendant's conviction of felonious breaking and entering cannot stand. "Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon." N.C. Gen. Stat. § 14-54(a) (2001). The State presented no evidence that defendant entered the mobile home with the intent to commit a

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felony or larceny. Instead, there is evidence that defendant committed wrongful breaking and entering, a Class 1 misdemeanor. *See* N.C. Gen. Stat. § 14-54(b) (2001).

[3] By his second assignment of error, defendant argues that the trial court erred in ordering restitution. We agree in part with defendant. As we have already concluded, the table and chairs, personal property valued at \$400.00, did not belong to Montague. As such, he was not a victim of larceny as an “aggrieved party” to be compensated “for the damage or loss caused by the defendant arising out of the offense or offenses committed by defendant.” N.C. Gen. Stat. § 15A-1343(d) (2001). Therefore, the trial court erred in ordering defendant to pay Montague restitution in the amount of \$400.00 for loss of personal property. The \$150.00 attributable to defendant’s damage to the mobile home, however, is proper and must stand on remand.

In conclusion, we hold that the trial court erred in denying defendant’s motion to dismiss the charge of felony larceny and in ordering restitution for the value of the personal property. Moreover, the trial court erred in failing to dismiss the charge of felony breaking and entering.

We therefore vacate defendant’s convictions of felony breaking and entering and felony larceny and remand for sentencing on misdemeanor breaking and entering.

Reversed and remanded.

Judges CAMPBELL and LEWIS concur.

BLAIR CONCRETE SERVICES, INC. AND RUSSELL SMITH, PLAINTIFFS v. VAN-ALLEN
STEEL COMPANY, INC. AND R.P. CONSTRUCTION COMPANY, INC., DEFENDANTS

No. COA01-478

(Filed 6 August 2002)

Workers’ Compensation— recovery of benefits from third party—no admission of liability

The trial court correctly granted summary judgment for defendants in an action to recover workers’ compensation benefits paid to plaintiff Smith by his employer (plaintiff Blair) where

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Smith was injured by a falling steel joist erected by defendants. There was no pleading, affidavit, or other documentation of a written admission of liability filed by the employer with the Industrial Commission, as required by N.C.G.S. § 97-10.2(c).

Appeal by plaintiffs from judgment entered 12 February 2001 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 14 February 2002.

Bailey & Dixon, L.L.P., by David S. Coats, for plaintiff-appellants.

Teague, Campbell, Dennis & Gorham, L.L.P., by Henry Gorham and Tracey L. Jones, for defendant-appellee Van-Allen Steel Company, Inc.

Alexander H. Barnes, for defendant-appellee R.P. Construction Company, Inc.

HUDSON, Judge.

Plaintiffs appeal the trial court's judgment which granted defendants' motion for summary judgment and denied plaintiffs' motion to strike an affidavit of attorney Nicholas Stratas from the record. The pertinent facts are as follows: on 10 November 1995, plaintiff Russell Smith ("Smith") and his co-worker Ricardo Silva ("Silva") were injured while working for plaintiff Blair Concrete Services, Inc. ("Blair") at a construction project in Johnston County. Defendant R.P. Construction Company, Inc. ("R.P.") was the general contractor for the project and defendant Van-Allen Steel Company, Inc. ("Van-Allen") was a subcontractor responsible for erecting bar joists. Blair was a subcontractor responsible for providing concrete and concrete services. On 10 November 1995, while Smith and Silva¹ were working on the project, one of the steel joists fell and struck them, causing injuries to both workers. As a result of these work-related injuries, Blair alleged that it paid more than \$10,000 in workers' compensation benefits due to Smith's injuries.

On 6 November 1998, four days before the statute of limitations was to run, Blair filed a lawsuit in Superior Court against Van-Allen and R.P. alleging that both defendants' negligence caused the injuries to Smith, and that Blair was entitled to recover from defendants for

1. Silva's claims were voluntarily dismissed, and he is no longer a party to this action.

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the workers' compensation Blair paid due to Smith's injuries. On 27 September 1999, the court entered an order allowing Blair to amend its complaint and add Smith as a party plaintiff; in the same order, the court denied the defendants' motions to dismiss. In July and August of 2000, R.P. and Van-Allen each filed a motion for summary judgment. In support of its motion for summary judgment, R.P. filed an affidavit of Nicholas A. Stratas, an attorney who stated that he represented Smith in his workers' compensation claim against Blair. Mr. Stratas stated in his affidavit that during his representation of Smith, he did not pursue a claim against R.P. because the "evidence tended to show that Blair [] was at fault, not R.P." The plaintiffs filed a motion to strike the affidavit from the record on the grounds that it failed to satisfy the requirements of Rule 56(e) of the North Carolina Rules of Civil Procedure, and that it violated Rule 3.7 of the North Carolina Revised Rules of Professional Conduct. On 12 February 2001, the trial court denied plaintiffs' motion to strike the affidavit and allowed both of defendants' motions for summary judgment. Plaintiffs appeal.

In their first argument, plaintiffs contend that the trial court erred in determining that the plaintiffs' third party claims are barred by the statute of limitations in N.C. Gen. Stat. § 97-10.2 (2001) "Rights under Article not affected by liability of third party; rights and remedies against third parties." The judgment stated without elaboration, "that no genuine issues of material fact exist as to Plaintiffs' rights under G.S. 97-10.2 and that Defendants [R.P. and Van-Allen] are entitled to judgment as a matter of law."

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Rules of Civil Procedure 56(c) (2001).

An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. [T]he party moving for summary judgment has the burden of establishing the lack of any triable issue of fact. Furthermore, the evidence presented by the parties must be viewed in the light most favorable to the non-movant.

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Here, Blair alleged that it paid workers' compensation benefits to Smith for his injuries, and that because defendants negligently caused the injuries to Blair's employee, Blair was entitled to recover from defendants the workers' compensation benefits it paid. Defendants concede that as an individual, Smith had three years within which to sue the defendants as third parties for negligence. *See* N.C. Gen. Stat. § 1-52(16) (2001). Defendants contend, however, that Blair did not have standing to sue defendants during the last 60 days before the statute of limitations ran, because the right to sue belonged exclusively to Smith under N.C.G.S. § 97-10.2(c) ("Provided that 60 days before the expiration of the period fixed by the applicable statute of limitations if neither the employee nor the employer shall have settled with or instituted proceedings against the third party, all such rights shall revert to the employee or his personal representative."). Thus, defendants reason that Blair was not the proper party to file the claim, and that the Order adding Smith did not relate back, so that the claim was time-barred. For the reasons below, we need not reach this issue.

In *Lovette v. Lloyd*, 236 N.C. 663, 668, 73 S.E.2d 886, 891 (1953), the Supreme Court noted that "G.S. § 97-10 clearly contemplates that the action against the third party is to be tried on its merits as an action in tort." According to N.C.G.S. § 97-10.2(b), the employee "shall have the exclusive right to proceed to enforce the liability of the third party by appropriate proceedings if such proceedings are instituted not later than 12 months after the date of injury." N.C.G.S. § 97-10.2(c) gives either the employee or the employer the right to sue a third party tortfeasor "[i]f settlement (with the third party) is not made and summons is not issued within said 12-month period," and "if employer shall have filed with the Industrial Commission a written admission of liability for the benefits provided by this Chapter." (emphasis added). Here, neither Smith nor Blair settled with or sued the third parties (defendants) during the initial 12 months after the injuries.

The record reflects that Blair alleged in paragraph 21 of the amended complaint that it compensated Smith for benefits provided under workers' compensation. In its Answer, R.P. stated that it did not have sufficient knowledge regarding these allegations and therefore denied same. Van-Allen simply denied the paragraph. None of the parties presented this Court with any pleading, affidavit, or other documentation indicating that Blair did or did not file a written admission of liability with the Industrial Commission. Since we believe that the

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statute clearly requires that this fact be established before the employer (Blair) could “proceed to enforce the liability” of Van-Allen and R.P., and there is nothing at all in the record tending to establish or create a genuine issue about this material fact, we believe the trial court correctly granted the defendants’ summary judgment motions. *See* N.C.G.S. § 97-10.2(c).

Finally, we believe we must note the distinction between this case and the Supreme Court’s opinion in *Radzisz v. Harley Davidson of Metrolina*, 346 N.C. 84, 484 S.E.2d 566 (1997). *Radzisz* interprets the language of N.C.G.S. § 97-10.2(f), which is similar to the language in N.C.G.S. § 97-10.2(c) at issue here. In essence, the Supreme Court in *Radzisz* held that the employer was not required to file an admission of liability for workers’ compensation benefits prior to settlement of a third party claim in order to have the lien described in N.C.G.S. § 97-10.2(f) and (h). *See id.* Here, the employer is attempting to pro-actively file a third-party claim under N.C.G.S. § 97-10.2. There has been no settlement or verdict in the third-party claim, no proceeds to which a lien could apply, and thus no lien to discuss. This case concerns only how to determine if the employer (rather than the employee) has shown it qualifies under N.C.G.S. § 97-10.2 to seek reimbursement for payment of workers’ compensation, by filing a suit against the third-party tortfeasor. Our decision here is based on the plain language of 97-10.2(c), to which the lien analysis in *Radzisz* does not apply. We hold that the employer Blair was required to prove or at least raise a genuine issue about whether it filed “a written admission of liability for the benefits provided” in accordance with N.C.G.S. § 97-10.2(c), and affirm the trial court’s order which granted summary judgment to the defendants.

In their second assignment of error, plaintiffs contend that the trial court erroneously failed to strike from the record Mr. Stratas’ affidavit. We review the trial court’s ruling on the motion to strike the affidavit for abuse of discretion. *See Barnhill Sanitation Service v. Gaston County*, 87 N.C. App. 532, 536, 362 S.E.2d 161, 164 (1987), *disc. rev. denied*, 321 N.C. 742, 366 S.E.2d 856 (1988). We find that the trial court did not abuse its discretion and affirm the denial of plaintiffs’ motion.

Affirmed.

Judges TIMMONS-GOODSON and CAMPBELL concur.

STATE v. QUICK

[152 N.C. App. 220 (2002)]

STATE OF NORTH CAROLINA v. WILLIAM LAMONTE QUICK, DEFENDANT

No. COA01-922

(Filed 6 August 2002)

Constitutional Law— effective assistance of counsel—tactical decision

A defendant in an assault with a deadly weapon with intent to kill inflicting serious injury, possession of cocaine, and possession of a firearm by a convicted felon case did not receive ineffective assistance of counsel by failing to call as a witness a psychiatrist who had examined defendant to offer testimony of defendant's mental illness to negate the mental state required for the offenses where the psychiatrist's report had concluded that defendant did know right from wrong at the time of the crimes, the psychiatrist's testimony would not have necessarily helped defendant if he had been called as a witness, and there is no basis to conclude that counsel's decision not to call a doctor as a witness at the trial was anything other than a sound tactical choice.

Appeal by defendant from judgments entered 8 May 2000 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 14 May 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Charles J. Murray, for the State.

Ligon and Hinton, by Lemuel W. Hinton, for the defendant-appellant.

HUDSON, Judge.

Defendant appeals his convictions for two counts of assault with a deadly weapon with intent to kill inflicting serious injury, possession of cocaine, and possession of a firearm by a convicted felon, for which he was sentenced to a minimum 362 months and a maximum 454 months.

The charges all arose out of an altercation between defendant, William Lamont Quick, and two Raleigh police officers who were securing a home where they believed illegal drugs were being sold. During these events, defendant shot and injured Officer R.B.

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Edmundson and Officer R.L. Warner, and the officers shot at defendant. Defendant ran away from the area, but later turned himself into authorities.

As a result of this incident, defendant was indicted for possession with intent to sell and deliver cocaine, two counts of assault with a deadly weapon with intent to kill inflicting serious injury, two counts of attempted murder, possession of a firearm by a convicted felon, and possession of a stolen firearm. Before trial, defendant attempted suicide twice and was held “under a safekeeping order in the Mental Health Ward at Central Prison.” Because he was indigent, defendant requested and received funds from the state to employ “an expert in the field of forensic psychology to examine, evaluate and prepare to testify on behalf of the defendant in this matter.” The defendant employed Dr. James E. Bellard, a forensic psychiatrist, who examined defendant and prepared a report concerning defendant’s mental condition. At trial, defendant’s attorney introduced the report under seal, but did not call Dr. Bellard to testify until the sentencing hearing.

At the trial, the State presented the testimony of the two officers involved, who testified that defendant fired on them first. Defendant contended during trial that he shot the officers in self-defense, and his attorney presented evidence to that effect. Defendant himself testified that he was running away from the scene when he heard gunshots behind him, and he shot back at the officers.

At the close of the State’s evidence, the trial court dismissed the charge of possession of a stolen weapon. On 8 May 2000, the jury found defendant guilty of two counts of assault with a deadly weapon with intent to kill inflicting serious injury, possession of cocaine, and possession of a firearm by a convicted felon, for which he was sentenced to a minimum 362 months and a maximum 454 months. The court also recommended that defendant receive mental health treatment while incarcerated. Defendant appeals his convictions.

In his sole argument, defendant contends that he “received ineffective assistance of counsel in violation of his rights under the Sixth Amendment to the United States Constitution and Article I, Section[] 23 of the North Carolina Constitution by counsel’s failure to introduce expert testimony of defendant’s mental illness to negate the mental state required for the offenses for which defendant was charged.” Defendant raised six additional assignments of error in the Record on Appeal, but, as none have been brought forward, they are deemed abandoned. *See* N.C. R. App. Proc. 28(a) (2001).

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“A defendant’s right to counsel includes the right to the effective assistance of counsel.” *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771, 25 L. Ed. 2d 763, 773 (1970)). To obtain relief for ineffective assistance of counsel, the defendant must demonstrate initially that “his counsel’s conduct fell below an objective standard of reasonableness.” *Id.* at 561-62, 324 S.E.2d at 248 (citing *Strickland v. Washington*, 466 U.S. 668, 688, 80 L. Ed. 2d 674, 693 (1984)). The defendant’s burden of proof requires the following:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687, 80 L. Ed. 2d at 693. “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694, 80 L. Ed. 2d at 698; *see also State v. Montford*, 137 N.C. App. 495, 502, 529 S.E.2d 247, 252 (2000) (describing the standard of review for an ineffective assistance of counsel claim).

Defendant contends that his attorney erred by not calling Dr. Bellard to testify during the trial, because Dr. Bellard’s testimony might have negated the defendant’s ability to form the specific intent necessary to commit the crimes charged. Additionally, he argues that Dr. Bellard’s testimony might have provided the evidentiary basis for an instruction to the jury on voluntary intoxication and diminished capacity. “The decisions on what witnesses to call, whether and how to conduct cross-examination, . . . and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client. Trial counsel are necessarily given wide latitude in these matters.” *State v. Milano*, 297 N.C. 485, 495, 256 S.E.2d 154, 160 (1979) (citations omitted), *overruled on other grounds by State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983).

Further, we have reviewed the report which was submitted to this Court as part of the Record. In part, Dr. Bellard states:

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3. Because of his mental illness, Mr. Quick did not, on the night of the crime, fully grasp the wrongfulness of his actions. It is my opinion that Mr. Quick did know right from wrong at the time of the crime. His mental illness was not so severe that it rendered him unable to distinguish from right and wrong. His mental illness was so severe however as to make less clear to him the wrongfulness of his actions. His Mania and drug abuse made him paranoid and considerably more defensive and he believed at the time of the crime that he had "a right to defend himself."

4. Mr. Quick's prognosis is fair. If he can be persuaded to be consistent and regular with taking his medications, he is likely to show a good improvement from his Bipolar illness. Also, in an incarcerated setting, he is much less likely to abuse drugs.

Based on our review, we are not persuaded that, had the doctor testified at trial, his testimony necessarily would have helped the defendant. Under these circumstances, we have no basis to conclude that counsel's decision not to call the doctor as a witness at the trial was anything other than a sound tactical choice.

Consequently, defendant has not satisfied the first prong of *Strickland*, in that he has not shown that his counsel's performance was deficient. *See Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. Thus, we do not reach the second prong of the *Strickland* test. *See id.* Accordingly, given the standard of review of these issues, we conclude that counsel's failure to call Dr. Bellard to testify did not render counsel's assistance constitutionally defective.

No error.

Judges GREENE and BIGGS concur.

N.C. INS. GUAR. ASS'N v. INTERNATIONAL PAPER CO.

[152 N.C. App. 224 (2002)]

NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, PLAINTIFF v. INTERNATIONAL PAPER COMPANY, F/K/A FEDERAL PAPER BOARD COMPANY, INC., JOHNS MANVILLE INTERNATIONAL, INC., CAROLINA STALITE COMPANY, LIMITED PARTNERSHIP, PIEDMONT INSULATION, INC., TEXFI INDUSTRIES, INC., GENE'S ELECTRIC, INC., BENJAMIN F. SHAW COMPANY, ROHN INDUSTRIES, INC., T.C. HENDRIX, D/B/A HENDRIX GARBAGE DISPOSAL, D. & B. INSULATION COMPANY, INC., MILLER BREWING COMPANY, PI MECHANICAL, INC., BROYHILL INDUSTRIES, INC., RHYNE MILLS, INC. AND B & G HEATING & AIR CONDITIONING, INC., DEFENDANTS

No. COA01-1179

(Filed 6 August 2002)

Workers' Compensation— subject matter jurisdiction—insolvent insurers

The trial court correctly dismissed a declaratory judgment action for lack of subject matter jurisdiction where plaintiff sought a declaration of its responsibilities pursuant to legislation concerning workers' compensation claims against insolvent insurers. The relief sought by plaintiff would directly impact the Industrial Commission's duty to determine pending cases and the Commission is empowered by statute and precedent to adjudicate the issue presented by plaintiff.

Appeal by plaintiff from order entered 12 June 2001 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 22 May 2002.

Moore & Van Allen, PLLC, by Joseph W. Eason and Christopher J. Blake, for plaintiff-appellant.

Battle, Winslow, Scott & Wiley, PA, by Marshall A. Gallop, Jr., for defendant-appellee International Paper Company f/k/a Federal Paper Board Company, Inc.

Parker, Poe, Adams & Bernstein LLP, by James C. Thornton and Kevin L. Chignell, for defendant-appellee Gamewell Mechanical, Inc.

Cranfill, Sumner & Hartzog, LLP, by Anthony T. Lathrop and Erin Fleming Taylor, for defendant Miller Brewing Company.

Wallace & Graham, PA, by Edward L. Pauley, Amanda Kims, and Jean Martin; Donaldson & Black, PA, by Todd Cline; Martin & Jones, by H. Forest Horne, Jr., for intervenors Lawrence Grace, et al.

N.C. INS. GUAR. ASS'N v. INTERNATIONAL PAPER CO.

[152 N.C. App. 224 (2002)]

BRYANT, Judge.

On 7 July 2000, the North Carolina Insurance Guaranty Association (Association) commenced this action seeking a declaratory judgment as to its responsibilities pursuant to certain 1992 amendments to N.C.G.S. § 58-48-1 to -130 (Insurance Guaranty Association Act) and N.C.G.S. § 97-1 to -200 (North Carolina Workers' Compensation Act). The 1992 amendments in question, assigned to the Association certain responsibilities for claims made against insurers which had issued policies of workers' compensation insurance and became insolvent prior to 1 January 1993.

In the original complaint, the Association brought suit against sixteen employers to whom policies of insurance had been issued by insurers that had become insolvent prior to 1993, and against whom certain workers' compensation claims had been filed several years after 1993. After the dismissal of several of the original named employer defendants, the Association filed an amended complaint again naming sixteen employers as defendants and seeking the same relief. Sometime between the filing of the original and amended complaint, a number of employees or their representatives, filed motions to intervene in this proceeding. The motions to intervene were allowed.

Several employers and intervenors filed motions to dismiss the complaint. Following a hearing held on 17 November 2000, in an order filed on 12 June 2001, the motions to dismiss this action were allowed pursuant to N.C.R. Civ. P. 12(b)(1) (lack of subject matter jurisdiction). The Association gave its notice of appeal on 9 July 2001.

1992 Amendments

Prior to 1992, the Commissioner of Insurance administered security funds, established in Article 3 of Chapter 97, to pay workers' compensation claims against employers whose insurance carriers had become insolvent. In 1992, the General Assembly enacted legislation amending the Insurance Guaranty Association Act (IGAA) and the Workers' Compensation Act, to bring these claims within the scope of the IGAA and under the administration of the Association. *See* 1991 N.C. Sess. Laws 802, § 6. The balances of the security funds previously created pursuant to Chapter 97, were transferred to two new separate accounts created within the IGAA.¹ The Association

1. The legislation created a new Stock Fund Account and Mutual Fund Account.

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assumed responsibility for administering the accounts in accordance with the provisions of Article 48.

The 1992 amendments provided that the Association, in administering the funds, is to “[p]ay stock or mutual carrier claims made against the security funds . . . but only for claims existing before January 1, 1993.” 1991 N.C. Sess. Laws 802, § 7. In addition, the amendments provided that funds “shall be used to pay the claims against insolvent stock workers’ compensation insurers and insolvent mutual workers’ compensation insurers, respectively, . . . where the insolvency occurred prior to January 1, 1993” 1991 N.C. Sess. Laws 802, § 10.

Issue

The issue presented is whether the trial court had subject matter jurisdiction to interpret the scope of the Association’s statutory responsibilities under the 1992 amendments. Specifically, the Association seeks a declaratory judgment as to whether it is obligated to defend and indemnify workers’ compensation claims against insolvent insurers that arose prior to 1 January 1993, but which were not filed until after that date. For the following reasons, we hold that the trial court lacked subject matter jurisdiction to adjudicate the issue presented. The decision of the trial court is therefore affirmed.

Analysis

The Industrial Commission is vested with jurisdiction to hear “[a]ll questions arising under” the Workers’ Compensation Act. N.C.G.S. § 97-91 (2001). By statute, the Industrial Commission is charged with the duty of administering provisions of the Act such as to provide speedy, substantial and complete relief to all parties bound by the Act. *Greene v. Spivey*, 236 N.C. 435, 445-46, 73 S.E.2d 488, 496 (1952); see N.C.G.S. § 97-77 (2001). In addition to jurisdiction conferred by statute, our Supreme Court has stated that the Industrial Commission “possesses such judicial power as is necessary to administer the Workers’ Compensation Act.” *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 138, 337 S.E.2d 477, 483 (1985), *appeal after remand*, 94 N.C. App. 640, 381 S.E.2d 151 (1989), *reversed on other grounds*, 326 N.C. 476, 390 S.E.2d 136 (1990).

The workers’ compensation claims referenced in the Association’s complaint involve alleged occupational diseases suffered by employees and allegedly caused by exposure to hazardous materials

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found in the employees' workplaces. The Association's action seeks, *inter alia*, to determine whether these employees (and similarly situated employees) are entitled to receive workers' compensation benefits out of the Stock Fund and/or Mutual Accounts Fund.

In making such a determination, certain issues of material fact arise, including: "1) how long was [the] employee exposed to the hazards of the occupational disease; 2) in whose employment was employee last injuriously exposed to the hazards of the occupational disease; and 3) who was the insurance carrier, if any, on the risk when [the] employee was last exposed." These factual determinations are within the exclusive jurisdiction of the Industrial Commission. In fact, these exact issues are pending before the Industrial Commission in the workers' compensation claims referenced in the Association's complaint.

The Industrial Commission has jurisdiction to interpret laws bearing on the claims before it. *Pearson v. C.P. Buckner Steel Erection Co.*, 348 N.C. 239, 498 S.E.2d 818 (1998), *appeal after remand*, 139 N.C. App. 394, 533 S.E.2d 532 (2000), *review denied*, 353 N.C. 379, 547 S.E.2d 434 (2001). Its jurisdiction also includes the right and duty to decide questions of fact and law regarding the liability of an insurance carrier. *Spivey v. General Contractors*, 32 N.C. App. 488, 232 S.E.2d 454 (1977); *see also, Greene v. Spivey*, 236 N.C. 435, 73 S.E.2d 488 (1952) (holding that questions of insurance coverage are within the jurisdictional parameters of the Industrial Commission). Pursuant to N.C.G.S. § 58-48-35(a)(2) (2001), the Association is deemed an insurer for the purposes of rendering payment for workers' compensation claims of insolvent insurers.

In the case at bar, the relief sought by the Association would directly impact upon the Industrial Commission's duty to determine whether indemnification and defense benefits are entitled to be granted in cases pending before the Industrial Commission. The Industrial Commission is empowered by statute and precedent to adjudicate the issue presented by the Association. We therefore affirm the decision of the trial court and hold that the trial court lacked subject matter jurisdiction regarding the issue involved.

AFFIRMED.

Judges WALKER and McCULLOUGH concur.

McDONALD v. SKEEN

[152 N.C. App. 228 (2002)]

C. WAYNE McDONALD v. ERVIN DWAIN SKEEN T/A DWAIN SKEEN COMMERCIAL INDUSTRIAL REAL ESTATE

No. COA01-1069

(Filed 6 August 2002)

1. Appeal and Error— appealability—denial of summary judgment—substantial right

Although an appeal from the denial of a motion for summary judgment is generally an appeal from an interlocutory order, the right to avoid the possibility of two trials on the same issues affects a substantial right and allows an immediate appeal.

2. Collateral Estoppel and Res Judicata— collateral estoppel—issue never litigated and determined

The trial court did not err in a breach of contract case by denying defendant's motion for summary judgment on the basis of collateral estoppel, because the issue of defendant's agency status was never actually litigated and determined in the prior case.

3. Appeal and Error— preservation of issues—failure to present in motion—failure to argue at hearing

Although defendant contends the trial court erred in a breach of contract action by failing to grant summary judgment based on plaintiff's alleged failure to show any damages, defendant did not preserve this issue for appeal because defendant did not present this ground in his motion to dismiss or argue it at the hearing.

Appeal by defendant from judgment entered 28 March 2001 by Judge Henry E. Frye, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 22 May 2002.

Cunningham, Crump & Cunningham, PLLC, by James Calvin Cunningham, III, R. Flint Crump, and J. Calvin Cunningham for plaintiff-appellee.

Roberson, Haworth & Reese, PLLC, by Robert A. Brinson and Christopher C. Finan for defendant-appellant.

THOMAS, Judge.

Defendant, Ervin Dwain Skeen t/a Dwain Skeen Commercial Industrial Real Estate, appeals an order denying his motion for sum-

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mary judgment in this breach of contract case. He based that motion solely on collateral estoppel grounds. For the reasons discussed herein, we affirm.

The pertinent facts are as follows: Plaintiff, C. Wayne McDonald, was a party in an action previously before this Court where Skeen allegedly acted as an agent during the events leading to that lawsuit. See *Cap Care Group, Inc. v. McDonald*, 149 N.C. App. 817, 561 S.E.2d 578 (2002). We held a partnership existed between Cap Care and McDonald even though McDonald argued no such partnership was ever formed. In the instant case, McDonald claims Skeen breached his contract with him in that Skeen: (1) violated N.C. Gen. Stat. § 93A-6(a)(4) by acting as an agent for more than one party; (2) violated duties of loyalty and consent owed to McDonald; and (3) did not disclose that he was an agent for Cap Care.

McDonald contends Skeen fraudulently gave Cap Care confidential information that led to Cap Care's action to enforce a partnership. Skeen, according to McDonald, acted as an agent for both parties without McDonald's knowledge or permission. He also alleges Skeen violated his duty of loyalty and consent. Skeen was not a party to the previous action. That complaint and counterclaim only concerned the principals to the partnership, McDonald and Cap Care.

Here, Skeen filed a motion to dismiss and alleged: (1) absence of a justiciable case; (2) violation of the statute of limitations; (3) collateral estoppel; (4) estoppel by judgment; and (5) *res judicata*. Subsequently, Skeen moved for summary judgment, contending the *Cap Care* action conclusively established that McDonald knew about Skeen's involvement with Cap Care and that McDonald breached a partnership contract with Cap Care. Skeen presented the affidavits of many of the individuals involved in the *Cap Care* case to support his motion for summary judgment. McDonald also moved for summary judgment, although that motion is not included in the record.

The trial court denied Skeen's motion for summary judgment. He appeals.

[1] Before we consider Skeen's arguments, we note the trial court's order would not normally be immediately appealable because it would be considered interlocutory. *State ex rel. Employment Security Commission v. IATSE Local 574*, 114 N.C. App. 662, 663, 442 S.E.2d 339, 340 (1994). A ruling is interlocutory if it does not determine the issues but directs some further proceeding preliminary

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to a final decree. *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983). However, an interlocutory order may be heard in appellate courts if it affects a substantial right. *See* N.C. Gen. Stat. § 1-277(a) (1999). In *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982), our Supreme Court stated that “the right to avoid the possibility of two trials on the same issues can be such a substantial right.” Nonetheless, we find that the collateral estoppel claim has no merit.

[2] The doctrine of collateral estoppel “is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally.” *Scarvey v. First Federal Savings and Loan Ass’n of Charlotte*, 146 N.C. App. 33, 38-39, 552 S.E.2d 655, 659 (2001) (quoting *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973)). In order for collateral estoppel to be applicable, certain requirements must be met. The elements of collateral estoppel, as stated by our Supreme Court, are as follows: (1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined. *Thomas M. McInnis & Associates, Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986).

In *Cap Care*, the main issue was whether Cap Care and McDonald formed an enforceable partnership. This Court held that such a partnership agreement existed. The issue of Skeen’s agency status was never actually litigated and determined in the prior case. We thus reject Skeen’s argument.

[3] By his second assignment of error, Skeen contends the trial court erred in not granting summary judgment because McDonald failed to show any damages. However, Skeen did not present this ground in his motion to dismiss or argue it at the hearing, although he pled and fully argued the collateral estoppel ground. Thus, we do not consider this contention. *See* N.C.R. Civ. P. 7(b)(1); N.C.R. App. P. 10(b)(1).

AFFIRMED.

Judges WYNN and HUNTER concur.

SCOTTSDALE INS. CO. v. TRAVELERS INDEM. CO.

[152 N.C. App. 231 (2002)]

SCOTTSDALE INSURANCE COMPANY, PLAINTIFF-APPELLANT v. THE TRAVELERS INDEMNITY COMPANY, CARY AMERICAN LEGION POST 67, INC., DALLAS E. DANIELS, DONALD E. DANIELS, ANGELA M. DANIELS, EDWIN L. REEL, III, EDWIN L. REEL, JR., GRAHAM TRENT ELLIS, HOWARD ELLIS, JR., HARRY H. HURLEY AND NANCY C. HURLEY, DEFENDANT-APPELLEES

No. COA01-861

(Filed 6 August 2002)

Insurance— commercial liability policy—conflicting provisions—ambiguous—construed against insurer

The trial court did not err in a declaratory judgment action arising from an automobile accident by granting summary judgment for defendants seeking a declaration of rights under an insurance policy. The accident involved American Legion baseball players driving to a game and the policy had an exclusion for the use of an automobile and an endorsement for activities incidental to games. The policy was ambiguous and was construed against the insurer.

Appeal by plaintiff from order entered 2 March 2001 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 20 May 2002.

Cranfill, Sumner & Hartzog, L.L.P., by Susan K. Burkhart, for plaintiff-appellant.

Kirschbaum, Nanney, Brown & Keenan, P.A., by Stephen B. Brown, for defendant-appellee Cary American Legion Post 67, Inc.

Kirby & Holt, L.L.P., by David F. Kirby and William B. Bystrynski, for defendant-appellees Dallas E. Daniels, Donald E. Daniels and Angela M. Daniels; DeMent, Askew, Gammon, Dement & Overby, by Angela L. DeMent, for defendant-appellees Harry H. Hurley and Nancy C. Hurley; and Law Offices of Walter Lee Horton, by Walter Lee Horton, for defendant-appellees Graham Trent Ellis and Howard Ellis, Jr.

McGEE, Judge.

Scottsdale Insurance Company (plaintiff) provides insurance coverage to Cary American Legion Post 67, Inc. (Post 67). Plaintiff issued Post 67 a commercial general liability insurance policy (the policy)

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which was effective 1 March 1994 until 1 March 1995. During this period, an automobile accident occurred involving the transport of Post 67 baseball players to an American Legion baseball game. Edwin L. Reel, III (Reel), a sixteen-year-old baseball player for Post 67, agreed to drive himself and five teammates from an American Legion baseball game in Chapel Hill, North Carolina to another American Legion baseball game in Cary, North Carolina. Reel apparently missed his exit off the highway and attempted to swerve onto the exit ramp. When he swerved, he lost control of the vehicle. The vehicle flipped over. One of the passengers died and two others were severely injured.

Three complaints were filed against Post 67 arising out of the accident. The complaints alleged that Post 67 was negligent in allowing the baseball players to ride with an inexperienced driver and in not providing reasonably safe transportation. The complaints also alleged Post 67 was vicariously liable in that Reel was acting as an agent of Post 67. The trial court granted summary judgment in favor of defendants, and the case was appealed. This Court affirmed the order as to two defendants but reversed the grant of summary judgment as to Post 67 with regard to the theory of vicarious liability. See *Daniels v. Reel*, 133 N.C. App. 1, 515 S.E.2d 22 (1999).

After this Court's decision, plaintiff filed this declaratory judgment action on 2 December 1999, seeking a declaration of its rights as to the insurance policy it issued to Post 67. In a motion dated 9 February 2001, plaintiff moved for summary judgment seeking a determination that the insurance policy afforded no insurance protection with regard to the accident. The trial court denied summary judgment for plaintiff, but granted summary judgment for defendants in an order entered 2 March 2001. Plaintiff appeals from this order.

Plaintiff argues the trial court erred in concluding that the designated premises endorsement which was added to the original policy expanded coverage to include the transportation of players to and from games and created an ambiguity with the auto exclusion in the policy. Plaintiff contends the auto exclusion and the premises endorsement do not conflict and should be read together and effect be given to all provisions in the policy. Plaintiff contends the auto exclusion precludes coverage for damages resulting from the use of an automobile by an insured, and that Reel was an insured under the policy. We disagree.

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"If there is uncertainty or ambiguity in the language of an insurance policy regarding whether certain provisions impose liability, the language should be resolved in the insured's favor. Moreover, exclusions from liability are not favored, and are to be strictly construed against the insurer." *Eatman Leasing, Inc. v. Empire Fire & Marine Ins. Co.*, 145 N.C. App. 278, 281, 550 S.E.2d 271, 273 (2001) (citations omitted).

In the case before us the original insurance policy contained the following exclusion:

2. Exclusions

This insurance does not apply to:

(g) "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading."

Plaintiff contends that because Reel was an insured under the policy and also because he was operating the vehicle at the time of the accident, the accident falls under the auto exclusion and plaintiff is not liable.

However, the insurance policy also includes an endorsement which was added to the policy. This endorsement expands the policy's coverage. The endorsement contains the clause "THIS ENDORSEMENT CHANGES THE POLICY." The endorsement then adds to the existing policy:

Coverage for ownership, maintenance or use of baseball fields, stands and practice areas and activities necessary or incidental to the conduct of practice, exhibitions, scheduled or postseason games is provided, except for not later than the last day of the world series played during the policy term.

Defendants contend that since the accident occurred while the baseball players were traveling from one scheduled Post 67 baseball game to another, the accident should be covered because the travel was an "activity necessary or incidental to the conduct of" a scheduled game. Defendants argue the endorsement should supplant the original exclusion if in fact the operation of the vehicle was incidental to the conduct of a game, regardless of whether the driver was an insured or not. Plaintiff argues the endorsement should expand the coverage

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only in ways the original exclusions would allow; in other words, activities incidental to the conduct of games are covered, unless those activities are ones in which an insured is operating a motor vehicle.

A reasonable reading of the insurance policy could produce either the reading offered by plaintiff or the reading offered by defendants; therefore, the policy is ambiguous. "Given the ambiguity, the policy, as amended by the endorsement, must be construed against [the insurer]." *Drye v. Nationwide Mut. Ins. Co.*, 126 N.C. App. 811, 815, 487 S.E.2d 148, 150 (1997). When an "endorsement provision . . . can be construed as being in direct conflict with the coverage provisions in the initial policy . . . the provisions most favorable to the insured, *i.e.* those in the endorsement, are controlling." *Id.* Therefore, the endorsement provision allows for coverage of the accident.

We affirm the trial court's order for summary judgment in favor of defendants.

Affirmed.

Judges McCULLOUGH and SMITH concurred.

JEANE HOBBY AND KEITH HOBBY, PLAINTIFFS V. CITY OF DURHAM AND DURHAM
BULLS BASEBALL CLUB, INC., DEFENDANTS

No. COA01-619

(Filed 6 August 2002)

Negligence— baseball stadium—protection from foul balls

The trial court did not err by granting defendants' Rule 12 (b)(6) motion to dismiss in a negligence action which arose when plaintiff was struck in the back of the head by a foul ball which bounced off a beam. Plaintiff chose to sit in a seat exposed to the hazards of the game rather than in a seat behind protective netting; even though a front protective screen might not have prevented this injury, defendants discharged their duty to plaintiff by providing a screened section.

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[152 N.C. App. 234 (2002)]

Appeal by plaintiffs from order entered 12 January 2001 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 21 February 2002.

R. Bradley Miller, for plaintiffs-appellants.

Smith, Helms, Mulliss & Moore, L.L.P., by Alan W. Duncan and Allison Overbay Van Laningham, for defendants-appellees.

THOMAS, Judge.

Plaintiffs, Jeane Hobby and her husband, Keith Hobby, appeal from an order dismissing their complaint against defendants, the City of Durham and the Durham Bulls Baseball Club, Inc.

The complaint, which is based on a claim that Ms. Hobby was injured by a foul ball during a Durham Bulls baseball game, was determined not to state a claim upon which relief can be granted. We affirm the trial court.

Plaintiffs contend Ms. Hobby was seated in the stands along the first line base at the Durham Bulls Athletic Park in Durham, North Carolina. The roof in that section was supported from the rear by exposed beams. A foul ball fell over the roof, bounced off one of the beams and struck her in the back of the head. In their complaint, plaintiffs claim that Ms. Hobby suffered permanent brain injury as a result. They further allege defendants "were negligent in failing to provide netting or padding, or take any other measure to prevent baseballs from bouncing off the exposed support structure for the roof or overhang and into the seating area so that spectators might be hit from behind."

Defendants answered, in part contending Ms. Hobby assumed the risk of injury as stated on her baseball admission ticket and that as a holder of the ticket she waived any right to recover. They allege the ticket included the following: "The holder of this ticket assumes all risk and danger incidental to the game of baseball, including specifically but not exclusively the danger of being injured by wild thrown and batted balls, and agrees that management is not liable for injuries resulting from such cases." Defendants filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2001). In an order dated 11 January 2001, the trial court granted defendants' motion. Plaintiffs appeal.

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Because plaintiffs appeal from a Rule 12(b)(6) dismissal, we treat all of plaintiffs' factual allegations as true. *See Hargrove v. Billings & Garrett, Inc.*, 137 N.C. App. 759, 529 S.E.2d 693 (2000).

The standard of review of an order dismissing a complaint for failure to state a claim upon which relief can be granted . . . is to determine whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. A complaint may be dismissed pursuant to Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim.

Id. at 760-61, 529 S.E.2d at 694 (citing *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 225, 517 S.E.2d 406, 413 (1999)) (internal citations and quotations omitted). In addition, "[s]uch motion is properly allowed when the factual allegations fail as a matter of law to state the substantive elements of some legally recognized claim." *Derwort v. Polk County*, 129 N.C. App. 789, 791, 501 S.E.2d 379, 381 (1998). Here, plaintiffs have brought a negligence claim against defendants. "To establish a *prima facie* case of actionable negligence, a plaintiff must allege facts showing: (1) defendant owed plaintiff a duty of reasonable care; (2) defendant breached that duty; (3) defendant's breach was an actual and proximate cause of plaintiff's injury; and (4) plaintiff suffered damages as a result of defendant's breach." *Winters v. Lee*, 115 N.C. App. 692, 694, 446 S.E.2d 123, 124, *disc. rev. denied*, 338 N.C. 671, 453 S.E.2d 186 (1994). "An inherent component of any ordinary negligence claim is *reasonable foreseeability of injury*." *Id.* This requires the plaintiff to sufficiently allege that "a man of ordinary prudence would have known that such or some similar injurious result was reasonably foreseeable from this negligent conduct." *Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 178 (1992).

Plaintiffs argue that the circumstances which resulted in Ms. Hobby's injury were not "common hazards incident to the game," in that the ball which hit Ms. Hobby bounced over the stadium roof and hit her from behind. However, our Supreme Court held in *Cates v. Exhibition Co.*, 215 N.C. 64, 66, 1 S.E.2d 131, 133 (1939), that

[t]hose operating baseball parks or grounds are held to have discharged their full duty to spectators in safeguarding them from the danger of being struck by thrown or batted balls by providing

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adequately screened seats for patrons who desire them, and leaving the patrons to their choice between such screened seats and those unscreened.

“[S]pectator[s], with ordinary knowledge of the game of baseball . . . accept[] the common hazards incident to the game . . . and ordinarily there can be no recovery for an injury sustained as a result of being hit by a batted ball.” *Erickson v. Baseball Club*, 233 N.C. 627, 629, 65 S.E.2d 140, 141 (1951). We note that Ms. Hobby did not choose to sit in a seat behind the protective netting; she elected to sit in a seat with some exposure to the risks of the game. In *Erickson*, 233 N.C. 627, 65 S.E.2d 140, our Supreme Court held that a ballpark was not negligent when a patron was injured during a game while sitting in unprotected seats, even though screened-in seats were already sold out when the patron arrived at the park. Although a front protective screen might not have protected Ms. Hobby from the injury alleged here, defendants nonetheless discharged their duty to Ms. Hobby by providing a screened section. Plaintiffs have failed to sufficiently allege that the circumstances disclose any other negligent breach of duty owed to plaintiffs. Accordingly, the order of the trial court dismissing plaintiffs’ claims against defendants is affirmed.

Affirmed.

Judges MARTIN and CAMPBELL concur.

STATE OF NORTH CAROLINA v. SHANE SEEK

No. COA01-600

(Filed 6 August 2002)

Probation and Parole— ex parte probation modification—written notice requirement

The trial court erred in an indecent liberties with a minor case by finding an ex parte probation modification entered on 26 June 2000 was valid even though defendant’s probation officer gave defendant oral notice of the modification, because: (1) defendant did not receive adequate notice of the modification since he never received written notice as required by N.C.G.S. § 15A-1343(c); and (2) contrary to the State’s assertion, the lack

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of written notice is not moot based on the original order's condition of probation requiring defendant to complete a parenting class before he could stay in a residence with his own child since the allegations against defendant and the evidence presented at trial do not mention defendant either completing or failing to complete any parenting class.

Appeal by defendant from order dated 27 November 2000 by Judge Gregory A. Weeks in Superior Court, Cumberland County. Heard in the Court of Appeals 13 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General J. Philip Allen, for the State.

Matthew Cockman for defendant-appellant.

McGEE, Judge.

Defendant was convicted of taking indecent liberties with a minor on 13 June 2000, in Superior Court, Harnett County. He was sentenced to twenty-four months of probation with a special condition that he not reside in any household with a minor child. The trial court modified this special condition by adding the words "other than his own[.]" and also added the additional special condition: "The defendant may reside with his own child providing he immediately enroll in and successfully complete an approved parent[ing] class."

Defendant's probation case was transferred to Cumberland County where defendant resided. However, the Cumberland County probation office refused to accept the case because it believed the special condition of probation was in violation of N.C. Gen. Stat. § 15A-1343(b2)(4). The case was sent back to Harnett County, where the Harnett County trial court modified the probation order on 26 June 2000 by striking the words "other than his own[.]" After this modification, Cumberland County accepted the transfer of the case. Defendant did not receive written notice of this modification, although Paul Hatch (Hatch), a Cumberland County probation officer, testified he told defendant orally of the modification.

Hatch filed a probation violation report stating defendant had remained overnight in the same residence as defendant's child on two occasions in September 2000, in violation of the modified probation order entered 26 June 2000. The court found on 27 November 2000

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that defendant wilfully violated his probation and ordered, as an additional condition of defendant's probation, that he abide by the conditions of the sex offender control program. Defendant appeals from this order.

Defendant first argues the court erred in not finding the *ex parte* probation modification entered on 26 June 2000 to be invalid. Defendant contends he did not receive adequate notice of the modification because he never received written notice. We agree.

N.C. Gen. Stat. § 15A-1343(c) (1999) states:

Statement of Conditions.—A defendant released on supervised probation must be given a written statement explicitly setting forth the conditions on which he is being released. If any modification of the terms of that probation is subsequently made, he must be given a written statement setting forth the modifications.

Defendant did not receive any written notification. The “provision requiring written notice of any modifications made in the terms of probation is mandatory, and we have no authority to rule otherwise.” *State v. Suggs*, 92 N.C. App. 112, 113, 373 S.E.2d 687, 688 (1988). Hatch did orally inform defendant of the modification; however, oral notice is not “a satisfactory substitute for the written statement that the statute requires[.]” *Id.*

The State argues the lack of written notice is moot because the original order's condition of probation required defendant to complete a parenting class before he could stay in a residence with his own child. The State argues that if the modified order was invalid, the original order was valid, and defendant violated those conditions by not completing the parenting class. However, the allegations against defendant and the evidence presented at trial do not mention defendant either completing or failing to complete any parenting class. Therefore, we reverse defendant's probation violation conviction. As we reverse defendant's conviction, we need not reach the constitutional issues defendant raises in his final assignment of error.

Reversed.

Judges EAGLES and TYSON concur.

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[152 N.C. App. 240 (2002)]

GOVERNOR'S CLUB, INC., A NORTH CAROLINA NON-PROFIT CORPORATION, AND ROBERT L. ALPERT, ON BEHALF OF HIMSELF AND ALL OTHER SIMILARLY SITUATED MEMBERS OF GOVERNORS CLUB, INC., PLAINTIFFS v. GOVERNORS CLUB LIMITED PARTNERSHIP, A DELAWARE LIMITED PARTNERSHIP, GOVERNORS CLUB DEVELOPMENT CORPORATION, A NORTH CAROLINA CORPORATION, ESTATE OF TRUBY J. PROCTOR, JR., AND KIRK J. BRADLEY, DEFENDANTS

No. COA01-394

(Filed 20 August 2002)

1. Fiduciary Relationship; Fraud; Unfair Trade Practices—breach of fiduciary duty—constructive fraud—motion to dismiss—sufficiency of evidence

The trial court erred by granting defendants' motions under N.C.G.S. § 1A-1, Rules 12(b)(6) and 12(c) regarding plaintiff club's claim for breach of fiduciary duty and constructive fraud against the individual defendants, and its claim for unfair and deceptive trade practices against all defendants arising out of the defective construction of the pertinent facilities that were allegedly not discoverable prior to the closing even though the parties signed an agreement containing provisions that would limit defendants' liability after title was conveyed to the club, because: (1) in regard to the breach of fiduciary duty and constructive fraud claims, plaintiff adequately alleged that the individual defendants owed it a fiduciary duty by stating that each defendant was at all relevant times a principal owner, a director, and an officer of both defendant corporation and plaintiff club, and that defendants collectively and/or individually misrepresented the contents of accepting a memorandum including the agreement; and (2) allegations sufficient to allege constructive fraud are sufficient to allege unfair and deceptive trade practices, and plaintiff adequately alleged that defendants' actions were unfair or deceptive, and that those actions proximately caused actual injury to plaintiff.

2. Contracts—breach—motion to dismiss—sufficiency of evidence

The trial court erred by granting defendants' motions under N.C.G.S. § 1A-1, Rules 12(b)(6) and 12(c) regarding plaintiff club's claim for breach of contract against defendant development corporation and defendant partnership for failing to construct an 18-hole golf course of championship quality and for failing to construct a clubhouse with an HVAC system appropriate to

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the size and uses of the clubhouse, because while the parties' agreement contained a comprehensive disclaimer of warranties provision whereby the club purported to accept the facilities including the golf course and the clubhouse in an "as is" condition, plaintiff alleges additional claims to the effect that such disclaimers were obtained from the club illegitimately.

3. Contracts—breach of implied covenant of good faith and fair dealing—motion to dismiss—sufficiency of evidence

The trial court erred by granting defendants' motions under N.C.G.S. § 1A-1, Rules 12(b)(6) and 12(c) regarding plaintiff club's claim for breach of implied covenant of good faith and fair dealing, because plaintiff's complaint sufficiently alleged that defendant partnership and defendant development corporation breached their implied duty of good faith and fair dealing in connection with the parties' agreement, amendment, and sale of the pertinent facilities to the club.

Judge TYSON concurring in part and dissenting in part.

Appeal by plaintiff Governors Club, Inc., from order entered 4 October 2000 by Judge Raymond A. Warren in Superior Court, Chatham County. Heard in the Court of Appeals 13 February 2002.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr. and Charles L. Becker, for plaintiff-appellant Governors Club, Inc.

McCoy, Weaver, Wiggins, Cleveland & Raper, P.L.L.C., by John E. Raper, Jr., for defendants-appellees Governors Club Limited Partnership and Governors Club Development Corporation.

Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Jr., and Gary R. Govert, for defendant-appellee Estate of Truby G. Proctor, Jr.

Boyce & Isley, P.L.L.C., by G. Eugene Boyce, for defendant-appellee Kirk J. Bradley.

WYNN, Judge.

Plaintiff Governors Club, Inc. (the "Club") appeals from a 4 October 2000 trial court order dismissing its complaint on all issues against Governors Club Limited Partnership (the "Partnership"), Governors Club Development Corporation (the "Development

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Corporation") (the Partnership and the Development Corporation are hereinafter referred to collectively as the "Developer"), Estate of Truby J. Proctor, Jr. ("Proctor"), and Kirk J. Bradley ("Bradley") (the Partnership, the Development Corporation, Proctor and Bradley are hereinafter referred to collectively as the "defendants"). Plaintiff Robert L. Alpert is not a party to this appeal. Following careful review, we reverse the trial court's 4 October 2000 order.

The Club and the Development Corporation are both North Carolina corporations. On 27 June 1989, the Club and the Development Corporation entered into a Facilities Purchase Agreement ("Agreement"). At the time, Bradley was the President of both the Club and the Development Corporation, and signed the Agreement on behalf of both entities. The Agreement provided for the Development Corporation's construction of an "eighteen (18) hole championship golf course designed by Jack Nicklaus," as well as a clubhouse, putting and chipping greens, a driving range, tennis courts and pool (collectively the "Facilities"). The Agreement further provided for the eventual sale of the Facilities to the Club no later than 1 January 1997, at which time the Club would purchase the Facilities and acquire the control and management thereof. Prior to closing, the Development Corporation would operate the Facilities.

In addition, the Agreement provided for the future creation of a six-member Advisory Committee, selected annually by the Development Corporation, to serve as a liaison between the Development Corporation and the Club members; the Advisory Committee was to have "no right, duty or obligation to act on behalf of the [Club] members" until closing. The Development Corporation agreed to select twelve Advisory Committee members immediately prior to closing, who would become the Club's Board of Directors upon closing. The Agreement also contained several provisions that would limit the Development Corporation's liability after title was conveyed to the Club. The Development Corporation later assigned the Agreement to the Partnership; at the time of the assignment, the Development Corporation was the Partnership's general partner.

Prior to closing, the Club and the Partnership amended the Agreement (the "Amendment") on 23 December 1996; Bradley signed the Amendment on behalf of both the Club (as its President) and the Partnership (as the President of its general partner, the Development Corporation). The Amendment altered various terms of the Agreement, such as (1) requiring the Developer to furnish a Closing Certificate to the Club at closing making certain representations; (2)

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requiring the then-sitting Advisory Committee to select independent legal counsel, at least thirty days prior to closing, to represent the Club in connection with the transactions contemplated within the Agreement, (3) requiring the Developer to select sixteen Advisory Committee members immediately prior to closing to become the Club's Board of Directors upon closing, and (4) setting a closing date of 1 January 1997. The Amendment recited that the amendments therein had been approved by a majority of the Club's members, and stated that "[e]xcept as specifically amended by this Amendment, the Agreement is hereby restated in full."

Closing of the contemplated transaction did in fact take place on 1 January 1997, at which time the Partnership furnished the required Closing Certificate to the Club, containing the required representations and warranties. However, plaintiff later brought this action, alleging that the Club and its members subsequently discovered numerous "latent defects in and problems with the [] Facilities that were not apparent or reasonably discoverable before the closing." Plaintiff detailed extensive defects in the golf course, wastewater holding ponds, and the clubhouse, and alleged that "neither the Agreement nor the Amendment nor the representations and warranties in the Closing Certificate were the result of an 'arm's length' bargaining between independent parties." Instead, "the Agreement and the Amendment were in reality agreements by the Developer with itself," whereby Defendants intended that the Club members would bear ultimate responsibility, financial and otherwise, for the Facilities. Plaintiff pointed out various disclaimers throughout the Agreement whereby the Developer sought to exonerate itself from any responsibility for the Facilities that it constructed, and exclusively cared for and controlled until the closing date.

The complaint further asserted that the Club members had no rights whatsoever under the Agreement, and were not intended third-party beneficiaries thereof. Additionally, the complaint alleged that the Club's Board of Directors prior to closing, as well as the "new" Board of Directors that took office at closing (comprised of the sixteen-member Advisory Committee selected by the Developer), were "hand-picked" by the Developer. The "independent legal counsel" selected by the Club's "new" Board of Directors to represent the Club in connection with the transfer at closing was alleged to be a long-time friend of defendant Bradley, suggested by Bradley to the Board. Plaintiff alleged that said "independent" counsel actually began providing counsel to the incoming Board of Directors on or about June

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1996. Accordingly, plaintiff asserted claims for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) reformation of contract, (4) fraudulent misrepresentation, (5) negligent misrepresentation, (6) breach of fiduciary duty, (7) constructive fraud, and (8) unfair and deceptive trade practices.

The Partnership and the Development Corporation answered separately, each asserting a N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1999) motion to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted. Both the Partnership and the Development Corporation also alleged that (1) upon information and belief, the Club members voted on and approved the Amendment in writing; (2) sometime between 1 January 1995 and 1 January 1997, all Club members were provided with a Governor's Club, Inc. Membership Offering Memorandum (the "Memorandum") containing a copy of the Agreement; (3) upon information and belief, sometime between 1 January 1995 and 1 January 1997, all Club members accepted the terms of Club membership set forth in the Memorandum, including an Acknowledgment Agreement specifically including an agreement by all Club members to be bound by the terms and conditions of the Agreement; (4) plaintiff "voluntarily assumed the risk of damage allegedly resulting from the purchase [of the Facilities] and [is] barred from recovery by an affirmative and voluntary assumption of known risks which were fully appreciated"; and (5) plaintiff waived its right to bring the claims in the complaint by ratifying all applicable agreements, wherein the Developer disclaimed all warranties and responsibilities relating to the alleged defects.

The Partnership and the Development Corporation each also asserted a counterclaim alleging that all Club members accepted the terms of Club membership as set forth in the Memorandum, as evidenced by the members' execution of the Acknowledgment Agreement whereby they agreed to be bound by the terms and conditions of the Agreement. The counterclaim alleged that, upon information and belief, the Amendment and its execution were voted upon and approved by the Club members in writing prior to the Amendment's execution. The counterclaim alleged further that the Memorandum refers to the "Disclaimer of Warranties" section of the Agreement, and specifically alerts the reader to the "substantial risks" to the Club and its members as a result thereof. The Partnership and the Development Corporation each pled plaintiff's alleged written acknowledgment and acceptance of the terms of the

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Agreement and the Amendment in bar to plaintiff's claims of fraud, and sought recovery from plaintiff for costs and expenses incurred in defending plaintiff's lawsuit.

In replying to the counterclaims of the Partnership and the Development Corporation, plaintiff asserted that "defendants collectively and/or individually misrepresented the contents and/or the effect of accepting the [] Memorandum, including the Agreement." Additionally, plaintiff asserted that:

several documents, including the Amendment, were submitted to then Club members for their approval by vote; that the defendants collectively and/or individually misrepresented the contents of said documents and/or the effect of accepting said documents; that a majority of the then Club members voted in favor of the documents submitted for their approval by vote[.]

Plaintiff also asserted an affirmative defense to the counterclaims, stating:

defendants collectively and/or individually intentionally or negligently misrepresented the contents of and/or the effect of accepting the [] Memorandum, including without limitation the Agreement and the Amendment, and accordingly, plaintiff[] plead[s] fraud as an affirmative defense to any and all of defendants' counterclaims.

Plaintiff also admits, as to the contents of the Memorandum, that it "is a written document that speaks for itself and is the best evidence of its contents." We note that the Memorandum is not a part of the record before this Court.

In granting defendants' Rule 12(b)(6) motions to dismiss, the trial court stated that it "considered the pleadings, motions, briefs and arguments of counsel." We must first determine whether, in doing so, the trial court converted defendants' Rule 12(b)(6) motions to dismiss into N.C. Gen. Stat. § 1A-1, Rule 56 (2001) motions for summary judgment or N.C. Gen. Stat. § 12(c) (2001) motions for judgment on the pleadings.

Ordinarily, if, on a Rule 12(b)(6) motion, the trial court considers matters outside the pleading, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[.]" N.C. Gen. Stat. § 1A-1, Rule 12(b); *see Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 262-63, 257 S.E.2d 50, 53, *disc. review denied*,

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298 N.C. 296, 259 S.E.2d 301 (1979) ("when outside matter is presented to and not excluded by the court on a motion under . . . Rule 12(b)(6) . . . , it should be treated as one for summary judgment under Rule 56"). However, where, as here, the matters outside the pleading considered by the trial court consist only of briefs and arguments of counsel, the trial court need not "convert the Rule 12 motion into one for summary judgment under Rule 56[.]" *Privette v. University of North Carolina*, 96 N.C. App. 124, 132, 385 S.E.2d 185, 189 (1989).

While the trial court did not treat defendants' motions as Rule 56 motions for summary judgment, it is less clear from the trial court's 4 October 2000 order whether it treated defendants' motions as Rule 12(c) motions for judgment on the pleadings. The trial court purported to rule on defendants' motions as Rule 12(b)(6) motions to dismiss; however, prior to ruling on the motions, the trial court permitted plaintiff additional time to reply to the Developer's counterclaims, and stated in its order that it "considered the *pleadings*, motions, briefs and arguments of counsel," thereby indicating that it considered all of the pleadings and treated defendants' motions as Rule 12(c) motions. In either case, after reviewing plaintiff's claims and the appropriate supporting documentation under both Rules 12(b)(6) and 12(c), we conclude that the trial court erred in granting defendants' motions, and reverse the trial court's order.

In reviewing a Rule 12(b)(6) motion to dismiss,

the factual allegations in plaintiff's complaint are treated as true. "A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint by presenting 'the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some [recognized] legal theory.' A motion to dismiss pursuant to Rule 12(b)(6) should not be granted " *'unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.'* "

Isenhour v. Hutto, 350 N.C. 601, 604-05, 517 S.E.2d 121, 124 (1999) (internal citations omitted). Under Rule 12(b)(6), we must therefore consider plaintiff's complaint to determine whether, when liberally construed (*see Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E.2d 757 (1987)), it states enough to give the substantive elements of a legally recognized claim. *See Booher v. Frue*, 86 N.C. App. 390, 358 S.E.2d 127 (1987).

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A Rule 12(c) motion for judgment on the pleadings is not favored by the law, *see Huss v. Huss*, 31 N.C. App. 463, 230 S.E.2d 159 (1976), and requires the trial court to view all facts and permissible inferences in the light most favorable to the nonmoving party. *See DeTorre v. Shell Oil Co.*, 84 N.C. App. 501, 353 S.E.2d 269 (1987). All factual allegations in the nonmovant's pleadings are deemed admitted except those that are legally impossible or not admissible in evidence. *See Cheape v. Town of Chapel Hill*, 320 N.C. 549, 359 S.E.2d 792 (1987).

Plaintiff concedes in its brief that the trial court properly dismissed its following claims: (1) Breach of contract, as against defendants Proctor and Bradley; (2) Breach of implied covenant of good faith and fair dealing, as against defendants Proctor and Bradley; (3) Reformation of contract, as against all defendants; (4) Fraudulent misrepresentation, as against all defendants; (5) Negligent misrepresentation, as against all defendants; (6) Breach of fiduciary duty, as against defendants Development Corporation and Partnership; and (7) Constructive fraud, as against defendants Development Corporation and Partnership. Plaintiff's remaining claims are: (1) Breach of contract, as against defendants Development Corporation and Partnership; (2) Breach of implied covenant of good faith and fair dealing, as against defendants Development Corporation and Partnership; (3) Breach of fiduciary duty, as against defendants Proctor and Bradley; (4) Constructive fraud, as against defendants Proctor and Bradley; and (5) Unfair and deceptive trade practices, as against all defendants.

I. Breach of Fiduciary Duty, Constructive Fraud, and Unfair and Deceptive Trade Practices

[1] Plaintiff first contends that the trial court erred in dismissing its claims for breach of fiduciary duty and constructive fraud as against defendants Proctor and Bradley. We agree.

A claim for breach of fiduciary duty requires the existence of a fiduciary duty. In its complaint, plaintiff asserted that Truby J. Proctor, Jr. and Bradley each was formerly (at all relevant times) "a principal owner, a director, and an officer of both the [Development] Corporation and the Club." The complaint also stated that, on information and belief, (1) Proctor "continues to be a principal owner of the [Development] Corporation," (2) Bradley "continues to be a principal owner, a director, and an officer of the [Development]

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Corporation, and (3) Bradley also “continues to be a director of the Club.”

Under North Carolina law, directors of a corporation generally owe a fiduciary duty *to the corporation*, and where it is alleged that directors have breached this duty, the action is properly maintained *by the corporation* rather than any individual creditor or stockholder. *Underwood v. Stafford*, 270 N.C. 700, 703, 155 S.E.2d 211, 213 (1967).

Keener Lumber Co., Inc. v. Perry, 149 N.C. App. 19, 560 S.E.2d 817, 822 (2002); *see also* N.C. Gen. Stat. § 55-8-30 (2001). Plaintiff thus adequately alleged that defendants Proctor and Bradley owed it a fiduciary duty.

Furthermore, G.S. § 55-8-30 requires a corporate director to discharge his or her duties as a director:

- (1) In good faith;
- (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
- (3) In a manner he reasonably believes to be in the best interests of the corporation.

G.S. §§ 55-8-30(a)(1)-(3). Having determined that defendants Proctor and Bradley, as principal owners, directors, and officers of the Club, owed it a fiduciary duty, we review the complaint as well as the additional pleadings to determine whether plaintiff sufficiently alleged a breach of that duty.

Plaintiff asserted in the complaint that “12. . . . neither the Agreement nor the Amendment nor the representations and warranties in the Closing Certificate were the result of ‘arm’s length’ bargaining between independent parties”; “14. . . . the Agreement and the Amendment were in reality agreements by the Developer with itself”; the Developer purported to disclaim any fiduciary duty on behalf of the Club or its members; the Club’s Board of Directors, which took office at closing, was hand-picked by the Developer; the “independent legal counsel” selected to represent the Club in the transaction was a long-time friend of defendant Bradley, and was selected by the Developer’s hand-picked directors; the provision allowing the Club’s Board of Directors to select the Club’s “independent legal counsel” was a “sham”; the Developer constructed the Facilities with numer-

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ous defects, many of which were latent, not apparent or reasonably discoverable prior to closing, and were in fact not discovered by Club members until after closing; the Club's Facilities were not properly constructed nor properly maintained prior to closing; defendants knew or reasonably should have known of the Facilities' defects, and failed to disclose them to the Club or its members; the presence of the defects was not known to or reasonably discoverable by the Club or its members; "60. Defendants stood in a relationship of special faith, confidence, and trust with respect to" plaintiff as the Club's officers and directors, and had exclusive control over the design, construction, operation and maintenance of the Facilities prior to closing; "61. . . . defendants owed plaintiff[] a fiduciary duty" and their acts and omissions breached said duty; and as a result of said breach, plaintiff suffered damages.

If we consider not only the complaint but all of the pleadings, plaintiff alleges in its reply to the Developer's counterclaims "that the defendants collectively and/or individually misrepresented the contents of and/or the effect of accepting the [] Memorandum, including the Agreement." Plaintiff also stated therein:

that the defendants collectively and/or individually intentionally or negligently misrepresented the contents of and/or the effect of accepting the [] Memorandum, including without limitation the Agreement and the Amendment, and accordingly, plaintiff[] plead[s] *fraud* as an affirmative defense to any and all of defendants' counterclaims.

(Emphasis added.)

Having considered this evidence, we conclude that the complaint sufficiently stated a claim for breach of fiduciary duty against defendants Proctor and Bradley to survive a Rule 12(b)(6) motion to dismiss. Similarly, the pleadings as a whole are sufficient to survive a Rule 12(c) motion for judgment on the pleadings on this claim.

A constructive fraud claim requires proof of circumstances:

" '(1) which created the relation of trust and confidence [the "fiduciary" relationship], and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.' " *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981) (citation omitted). Put simply, a plaintiff must

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show (1) the existence of a fiduciary duty, and (2) a breach of that duty.

Keener Lumber Co., Inc., 149 N.C. App. at 28, 560 S.E.2d at 824. Having determined that the trial court erred in granting defendants' Rule 12(b)(6) motions to dismiss plaintiff's breach of fiduciary duty claim, we likewise conclude that the trial court erred in dismissing plaintiff's constructive fraud claim as against defendants Proctor and Bradley.

Furthermore, allegations sufficient to allege constructive fraud are likewise sufficient to allege unfair and deceptive trade practices. See *Hajmm Co. v. House of Raeford Farms*, 94 N.C. App. 1, 14, 379 S.E.2d 868, 876 (1989), *modified and aff'd in part, rev'd in part on other grounds*, 328 N.C. 578, 403 S.E.2d 483 (1991). To establish a claim for unfair or deceptive trade practices under N.C. Gen. Stat. § 75-1.1 (2001), a plaintiff must show (1) defendant engaged in an unfair or deceptive practice or act, (2) "in or affecting commerce," and (3) such act proximately caused actual injury to the plaintiff. G.S. § 75-1.1; see *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 464 S.E.2d 47 (1995). The business of buying, developing and selling real estate is an activity "in or affecting commerce" for the purposes of G.S. § 75-1.1. See *Wilder v. Squires*, 68 N.C. App. 310, 315 S.E.2d 63, 311 N.C. 769, 321 S.E.2d 158, *disc. review denied*, 311 N.C. 769, 321 S.E.2d 158 (1984); see also *Wilder v. Hodges*, 80 N.C. App. 333, 342 S.E.2d 57 (1986); *Adams v. Moore*, 96 N.C. App. 359, 385 S.E.2d 799 (1989), *disc. review denied*, 326 N.C. 46, 389 S.E.2d 83 (1990). Plaintiff adequately alleged that Proctor's and Bradley's actions were unfair or deceptive, and that those actions proximately caused actual injury to plaintiff. Thus, the complaint was sufficient to survive defendants' motions on the claim of unfair and deceptive trade practices as against defendants Proctor and Bradley.

Additionally, we note that the actions of the Partnership, as a party to the Agreement, and the Development Corporation, as a party to the Agreement and the Amendment (as general partner of the Partnership), fall within the ambit of G.S. § 75-1.1. See, e.g., *Opsahl v. Pinehurst Inc.*, 81 N.C. App. 56, 344 S.E.2d 68 (1986). The complaint alleges that the actions of the Partnership and the Development Corporation were unfair or deceptive, and caused plaintiff actual injury. As such, the trial court erred in granting defendants' motions to dismiss these claims as against the Partnership and the Development Corporation.

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II. Breach of Contract

[2] In addition to its claims that defendants Proctor and Bradley breached their fiduciary duty to plaintiff and engaged in constructive fraud, and that all defendants engaged in unfair and deceptive trade practices, plaintiff asserts in its complaint and in its brief that the Development Corporation and the Partnership breached the contract (1) "by failing to construct an 18-hole golf course of championship quality," and (2) "by failing to construct a clubhouse with an HVAC system appropriate to the size and uses of the clubhouse."

In the Agreement, the Development Corporation contracted to construct "[a]n eighteen (18) hole championship golf course designed by Jack Nicklaus" and a golf clubhouse as part of the Facilities. The complaint alleged that the golf course was neither properly constructed nor properly maintained prior to closing, such that the course failed to meet United States Golf Association standards. Plaintiff alleged that neither the fairways nor the greens drained properly. Additionally, plaintiff alleged various defects in the clubhouse, including a woefully inadequate heating, ventilating and air conditioning system.

While the Agreement also contained a comprehensive "Disclaimer of Warranties" provision, whereby the Club purported to accept the Facilities (including the golf course and the clubhouse) in a "where is, as is" condition, plaintiff alleges additional claims to the effect that such disclaimers were obtained from the Club illegitimately. Indeed, defendant Bradley signed the Agreement on behalf of the Club as well as the Development Corporation, allegedly breaching his fiduciary duty to the Club and engaging in constructive fraud as well as unfair and deceptive trade practices. Under the circumstances, we conclude that the complaint was sufficient to survive defendants' motions on plaintiff's breach of contract claims against the Partnership and the Development Corporation.

III. Breach of Implied Covenant of Good Faith and Fair Dealing

[3] As recognized by our Supreme Court, " 'In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement.' " *Bicycle Transit Authority v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (citation omitted). Plaintiff's complaint alleged that the Partnership and the Development Corporation "breached their [implied] duty of good faith and fair deal-

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ing in their dealings with plaintiff[] in connection with the Agreement, the Amendment, and the sale of the [] Facilities to the Club." The complaint contained sufficient allegations to support this claim to survive defendants' motions, such that the trial court erred in granting the motions to dismiss this claim as against the Partnership and the Development Corporation.

In summation, after carefully reviewing the complaint, we hold that when all of the allegations therein are liberally construed and assumed to be true, the complaint sufficiently alleges adequate facts to survive a Rule 12(b)(6) motion to dismiss. Furthermore, all of the pleadings considered *in toto* (when all of the facts and permissible inferences therein are viewed in the light most favorable to plaintiff) are sufficient to survive a Rule 12(c) motion for judgment on the pleadings. Accordingly, we conclude that the trial court erred in dismissing plaintiff's claims as detailed above. The trial court's 4 October 2000 order is therefore,

Reversed.

Judge TIMMONS-GOODSON concurs.

Judge TYSON dissents.

TYSON, Judge concurring in part and dissenting in part.

I concur with the majority's opinion that the trial court correctly dismissed (1) all claims of Robert L. Alpert, (2) Governors Club Inc.'s ("Club") claims against defendants Kirk J. Bradley ("Bradley") and the Estate of Truby J. Proctor ("Proctor") for breach of contract and breach of implied covenant of good faith and fair dealing, (3) the Club's claims against Governors Club Limited Partnership ("Partnership") and Governors Club Development Corporation ("Development Corporation" Partnership and Development Corporation collectively "Developer" Bradley, Proctor, and Developer collectively "defendants") for breach of fiduciary duty, and (4) the Club's claims against all defendants for fraudulent and negligent misrepresentation. Plaintiff conceded in its brief and again during oral argument that the trial court properly dismissed these claims.

I respectfully dissent from the majority's holding that the trial court erred by dismissing the Club's claims for: (1) breach of contract, breach of implied warranty of good faith and fair dealing, and

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unfair and deceptive trade practices against Developer, and (2) breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices against defendants Bradley and Proctor. I would affirm the decision of the trial court.

The majority's opinion analyzes the remainder of the trial court's order under both Rule 12(b)(6) and Rule 12(c). Under either standard of review, the trial court did not err.

I. Standard of Review

A. Rule 12(b)(6)

On a motion to dismiss pursuant to Rule 12(b)(6), the court must determine "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory" *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citation omitted). "The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient." *State of Tennessee v. Environmental Mgt. Comm'n*, 78 N.C. App. 763, 765, 338 S.E.2d 781, 782 (1986) (citing *Leasing Corp. v. Miller*, 45 N.C. App. 400, 263 S.E.2d 313, *disc. rev. denied*, 300 N.C. 374, 267 S.E.2d 685 (1980)). Legal insufficiency may be due to: (1) the complaint on its face reveals that no law supports a plaintiff's claim, (2) the complaint on its face reveals the absence of facts sufficient to make a good claim, or (3) the complaint discloses some fact that necessarily defeats a plaintiff's claim. *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985); *Environmental Mgt. Comm'n*, 78 N.C. App. at 765, 338 S.E.2d at 782. A claim should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Garvin v. City of Fayetteville*, 102 N.C. App. 121, 123, 401 S.E.2d 133, 135 (1991); *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 167 (1970).

A Rule 12(b)(6) motion to dismiss is the modern equivalent of a demurrer. *Sutton*, 277 N.C. 94, 176 S.E.2d 161 (1970). In *Sherrill v. Western Union Tel. Co.*, 109 N.C. 527, 14 S.E. 94, 95 (1891) a plaintiff attached a copy of a telegraph message to his complaint. The deleterious message attached to the complaint became part of the complaint and created a bar to recovery. See also *Snug Harbor Property Owners Ass'n v. Curran*, 55 N.C. App. 199, 284 S.E.2d 752 (1981) (the trial court had properly considered exhibits, which consisted of

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seven documents, that were attached to and incorporated into plaintiff's complaint prior to ruling on the defendants' motions to dismiss).

B. Rule 10(c)

Rule 10(c) of the North Carolina Rules of Civil Procedure provides in part that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." N.C. Gen. Stat. § 1A-10(c) (2001). A complaint that attached and incorporated by reference a federal court complaint as an exhibit, and considered by the trial court, was not a matter outside of the pleadings to convert a Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment. Rule 10(c) provides that such an exhibit is part of the complaint for all purposes. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611, *rev. in part on other grounds*, 297 N.C. 181, 254 S.E.2d 611 (1979).

When the Club attached numerous exhibits to its complaint, those exhibits were adopted by the Club and are properly considered as part and parcel of the complaint. The disclosure of facts in the Club's exhibits were properly considered by the trial court and supports dismissal of the Club's complaint under Rule 12(b)(6).

Under Rule 12(c), the trial court properly considered all pleadings, including defendants' answers, exhibits attached thereto, and defendants' counterclaim, and the Club's reply to it. N.C. Gen. Stat. § 1A-1, Rule 12(c) (2001). Nothing contained in the defendants' answer, exhibits, and counterclaim, or the Club's reply to defendants' counterclaim saves the Club's claims under a Rule 12(c) analysis. The trial court correctly dismissed all of the Club's claims.

II. The Club's Claims Against Defendants Bradley and Proctor

I do not agree with the majority's opinion that the Club has sufficiently pled the elements of breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices claims against Bradley and Proctor for two reasons: (1) the Club makes no factual allegations sufficient to constitute claims for breach of fiduciary duty, constructive fraud, or unfair and deceptive trade practices against Bradley and Proctor, and (2) when all of the allegations in the complaint, and the facts contained in the exhibits attached thereto, are considered as true, a set of facts is disclosed that necessarily defeats the Club's claims.

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The majority's opinion concludes that the Club's complaint sufficiently pled a breach of fiduciary duty claim against Bradley and Proctor. The majority's opinion uses this conclusion to support its contention that the Club's complaint also sufficiently pled a constructive fraud claim against Bradley and Proctor without any analysis of constructive fraud. The majority's position on these claims constitutes an adoption of a *per se* rule against any individual who occupies a dual agency or fiduciary capacity and eviscerates well-established precedent discussed below.

The majority's opinion further states that "allegations sufficient to allege constructive fraud are likewise sufficient to allege unfair and deceptive trade practices."

I would hold the Club's complaint is insufficient to support a claim for breach of fiduciary duty. In the absence of any breach of fiduciary duty, there is no constructive fraud and no derivative claim for unfair and deceptive trade practices. Under these allegations there is also no independent basis for an unfair and deceptive trade practices claim.

A. Breach of Fiduciary Duty

The Club sufficiently alleged that Bradley and Proctor owed a fiduciary duty to the Club based on their status as owners, directors and officers of the Club. I disagree with the majority's conclusion that the Club's complaint "sufficiently stated a claim for breach of fiduciary duty against defendants Proctor and Bradley." The Club's complaint states that Bradley and Proctor "owed [the Club] a fiduciary duty always to act in good faith, openly, fairly, and honestly toward [the Club] . . . without taking advantage of [the Club]." The Club alleges no facts and circumstances to support its conclusory assertion that Bradley's and Proctor's "acts and omissions breached their fiduciary duty owed to [the Club]."

Directors "are liable for losses resulting from gross mismanagement and neglect of the affairs of the corporation. Good faith alone will not excuse them when there is lack of the proper care, attention, and circumspection in the affairs of the corporation which is exacted of them as trustees." *Anthony v. Jeffress*, 172 N.C. 378, 380, 90 S.E. 414, 415 (1916). Directors "are trustees and liable as such for losses attributable to their bad faith, misconduct or want of care. They are to direct and supervise the trust confided to them and are not mere figureheads." *Townsend v. Williams*, 117 N.C. 330, 336, 23 S.E. 461,

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463 (1895). There is no allegation in the complaint that Bradley and Proctor acted in bad faith, engaged in gross mismanagement, or were neglectful in their service as directors of the Club. On the contrary, the exhibits attached to the complaint disclose that Bradley and Proctor acted in good faith, exercised their fiduciary duties with care, and fully disclosed all material facts to any prospective Club member prior to purchase.

The majority's opinion lists the following thirteen statements in support of its conclusion that the complaint states a claim:

1. The Developer and the Club were owned and controlled by, and were managed and operated by defendants Proctor and Bradley. Consequently, neither the Agreement nor the Amendment nor the representations and warranties in the Closing Certificate were the result of arm's length bargaining between independent parties;
2. the Agreement and the Amendment were in reality agreements by the Developer with itself;
3. the Developer purported to disclaim any fiduciary duty on behalf of the Club or its members;
4. the Club's Board of Directors, which took office at closing, was hand-picked by the Developer;
5. the independent legal counsel selected to represent the Club in the transaction was a long-time friend of defendant Bradley, and was selected by the Developer's hand-picked directors;
6. the provision allowing the Club's Board of Directors to select the Club's independent legal counsel was a sham;
7. the Developer constructed the Facilities with numerous defects, many of which were latent, not apparent or reasonably discoverable prior to closing, and were in fact not discovered by Club members until after closing;
8. the Club's Facilities were not properly constructed nor maintained prior to closing;
9. defendants knew or reasonably should have known of the Facilities' defects, and failed to disclose them to the Club or its members;

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10. the presence of the defects was not known to or reasonably discoverable by the Club or its members;
11. defendants stood in a relationship of special faith, confidence, and trust with respect to plaintiff as the Club's officers and directors, and had exclusive control over the design, construction, operation and maintenance of the Facilities prior to closing;
12. defendants owed plaintiff a fiduciary duty and their acts and omissions breached said duty;
13. and as a result of said breach, plaintiff suffered damages.

Items one and two show that Bradley and Proctor were owners, directors, and officers of both corporations. The majority cites no authority for the proposition that individuals cannot simultaneously hold positions with different entities that engage in business transactions without breaching their fiduciary duties to either or both. Precedent is to the contrary. Allegations of dual-representation by themselves do not establish a breach of fiduciary duty. *Harrold v. Dowd*, 149 N.C. App. 777, 785, 561 S.E.2d 914, 920 (2002) (citing *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 667, 488 S.E.2d 215, 224 (1997)).

Bradley and Proctor originated, formed, and developed the Club. The majority's opinion offers no explanation how originators who seek to develop a golf course and club could develop it and not be subject to *post hoc* conclusory allegations of breach of fiduciary duty. The Agreement was drafted and executed in 1989. At that time, there were no members of the Club other than Bradley and Proctor available to sign the Agreement. The Club's complaint makes no allegation that Bradley and Proctor hid the agreement or failed to disclose its contents from anyone prior to joining the Club, or that anyone joined the Club without full disclosure of all material facts.

Statement three is used by the majority purportedly to show that by inserting a provision in the contract that limits Bradley's and Proctor's fiduciary duties toward the Club demonstrates that the Club properly alleged breach of fiduciary duty. The Agreement attached to the complaint contains the following provision.

No Fiduciary Duty. The parties agree that neither the Developer nor its employees, agents, officers and partners nor Club's incorporators or initial and interim Board of Directors and officers

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designated by the Developer owe any fiduciary duty to investigate, negotiate or otherwise act on behalf of the members of the Club or the Club.

The Club argues that the “only conceivable basis for the dismissal [of the complaint by the trial court] arises from [the no fiduciary duty] provision of the contract.” The majority’s opinion does not address whether Bradley and Proctor could disclaim their fiduciary duty. Presuming that the contract clause is of no legal effect and that Bradley and Proctor owed a fiduciary duty toward the Club, the Club’s complaint has not sufficiently alleged a breach of that duty, and the exhibits to the complaint disclose a set of facts that bars recovery. Alleging that a party inserted an exculpatory clause that purports to limit a legal duty into a contract is not sufficient to show a breach of that duty.

The complaint alleges that Bradley and Proctor “sought to insulate themselves from, and absolve themselves of, responsibility for any of their acts or omissions in connection with the Club Facilities, or any liability to the Members. They sought to do so principally by inserting numerous purported disclaimers and exonerations in the Agreement and the Amendment.” Nothing in this assertion alleges that Bradley and Proctor did not “act in good faith, openly, fairly, and honestly toward [the Club] . . . without taking advantage of [the Club].” Seeking to limit liability in developing an expansive golf course residential community worth \$7,230,000.00 over an eight year period does not in and of itself constitute a breach of fiduciary duty. Such waivers are enforceable in large scale development agreements and demonstrate nothing more than sound business planning for the originators of a large long-term project. These allegations only show that Bradley and Proctor sought to limit their liability to the extent legally possible, not that they breached any duty owed.

Items 4, 5, and 6 allege that the Club’s board of directors were “hand-picked” by the Developer, and that legal counsel for the Club was a “long-time friend of Bradley” and “hand-picked” by the “hand-picked” directors. Again, these allegations show nothing more than the Club had a board of directors and legal counsel. Without more, these assertions do not allege a breach of a fiduciary duty or constructive fraud. Whether or not the Club’s legal counsel was a friend of Bradley, he continued to owe the Club an independent duty under his oath to act in his client’s, the Club’s, best interest. No allegation in the complaint purports to show that the Club’s attorney did not perform his duty.

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Statements 7 through 11 attempt to show that Bradley and Proctor failed to disclose known latent defects about the Club's Facilities. These allegations are conclusory, and provide only cursory support for the majority's holding. Upon closer inspection, facts disclosed in the Club's exhibits attached to its complaint weaken this assertion, beyond recovery, to support a claim for breach of fiduciary duty.

The Club attached and incorporated into its complaint (1) the Agreement, (2) the Amendment, and (3) the Closing Certificate as exhibits. As noted above, attaching to and incorporating by reference these documents to the complaint made them part of the complaint for all purposes. N.C. Gen. Stat. § Rule 10(c).

The complaint states, the Amendment recites, and all parties admitted during oral argument, that the agreement as amended was approved by a majority vote of the Club's members. The Amendment specifically stated that the "parties believe that it is in the best interest of each party that the Agreement be amended to clarify certain matters . . ." and that the "amendments have been approved by a majority of the Members of the Club." The Amendment also "restated and incorporated the original Agreement in full to the extent it was not modified by the Amendment." It is undisputed that a majority vote by the Club's members approved the entire Agreement as amended.

The Club expressly acknowledged in the Amendment that it had "inspected all buildings, machinery, equipment, tools, furniture, improvements, and other assets" and acknowledged that all "are suitable for the purposes for which they are used and are in working condition . . . provided however that Developer agrees to repair or replace those items listed on the Disclosure Schedule."

The Closing Certificate reiterated that:

The Club has inspected all buildings, machinery equipment, tools, furniture, improvements, and other assets constituting a part to the Club Facilities and the Club acknowledges that they are suitable for the purposes for which they are used and are in working condition, reasonable wear and tear excepted, provided however that Developer agrees to repair or replace those items listed on the Disclosure Schedule.

The Club's complaint stated that this "inspection clause" was "the ultimate in self-serving statements" put into the Agreement by Bradley and Proctor. In its reply brief, the Club argues that the com-

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plaint's language implies that "the Club was not afforded meaningful opportunity to inspect the Club Facilities, and that Bradley and Proctor caused the Club to make this statement to further their financial interests." Alleging that a statement was "the ultimate in self-serving statements" does not imply and is not equivalent to what the Club attempts to argue in its reply brief.

On a Rule 12(b)(6) motion to dismiss, we must assume that the facts disclosed in the Disclosure and the Closing Certificate are true. Alleging in the complaint that the Disclosure's and Closing Certificate's language is "self-serving" is not sufficient to imply any breach of any duty that Bradley and Proctor owed to the Club.

The Disclosure contained a detailed punch list of items to be repaired or replaced at Developer's expense. These items included numerous corrections to the (1) golf course, (2) club house, (3) maintenance areas, and (4) swim and fitness center. The Disclosure provided a remedy to the Club if the items were not properly and timely repaired and/or replaced.

In the event the Developer has not begun the work or begun remedying the conditions listed above by July 31, 1997 . . . the Club at any time thereafter may provide the Developer 30 days prior written notice that it intends to exercise its right to take over and complete or remedy certain parts of the work or specific conditions at the Developer's expense if by December 31, 1997 such work or condition is not completed or remedied by Developer. If the Developer fails to complete the work by December 31, 1997 and the Club assumes completion of the work or remediation of a condition, the Club shall use commercially reasonable methods and competitive prices in undertaking and completing such work. Within 30 days after the Club completes the work, it shall provide the Developer with an accounting of and invoice for the charges, subject to any other information concerning the work reasonably requested by Developer, and Developer shall pay such invoice within 30 days thereafter.

This provision shows that the Club had arranged for the Facilities inspection, allowed for their necessary repairs, and provided for their completion. The Disclosure also provided a remedy to the Club if the items were not properly and timely repaired and/or replaced.

The Club's complaint does not allege nor does the Club argue here that the Developer did not repair or replace all items contained

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in the Disclosure. All parties stipulated at argument that all items on the Disclosure were timely repaired and/or replaced. The complaint contains no allegation that the Club undertook additional repairs or corrections as provided in the remedy. There is no allegation that Bradley and Proctor used any undue influence, took advantage of the Club for their own benefit, restricted the Club's members from discovering any defects, or hindered their discovery in any way. The facts alleged in the complaint and disclosed in the exhibits show exactly the contrary.

The Club alleged in their complaint and argues here that more repairs and replacements were needed that were not discoverable prior to closing and were not listed in the Disclosure. They also contend that Bradley and Proctor knew of the defects and did not disclose them. Failure to disclose material facts between fiduciaries constitutes fraud. *See Vail v. Vail*, 233 N.C. 109, 114, 63 S.E.2d 202, 206 (1951).

The Club admits on appeal, and the majority holds, that the Club's claims for negligent and intentional misrepresentation against Bradley and Proctor were properly dismissed by the trial court. The Club also admits that the trial court properly dismissed all claims of fraud against Bradley and Proctor. Any attempt to bootstrap a dismissed allegation of failure to disclose known defects, after the Club admitted and the majority's opinion holds that they were properly dismissed, to support a claim for breach of fiduciary duty is without merit.

An examination of the non-disclosure allegations contained in the Club's complaint also demonstrates that the Club failed to sufficiently state a claim. The majority's opinion states that the clubhouse had a "woefully inadequate heating, ventilating and air conditioning system" ("HVAC") to support the proposition that Bradley and Proctor concealed non-discoverable defects. The only "latent defect" mentioned in the Club's complaint with respect to the club house is an HVAC "system that lacks sufficient capacity to heat and cool the club house properly." The club house was completed in 1993. The Club's members used the facility nearly four years prior to closing. Nothing is mentioned whatsoever in the Disclosure about the HVAC system and its inability to properly heat and cool in the numerous items to be repaired/replaced prior to closing.

Having had the opportunity to observe and use the HVAC system for nearly four years, and after having made no mention of any defi-

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ciencies in the HVAC system in the Disclosure prior to approving and closing on the amended Agreement, it is incongruent for the Club to allege that the club house's HVAC's ability to heat and cool is a "latent defect" not reasonably discoverable.

Finally, concerning the "latent defects" allegedly known and concealed by Bradley and Proctor regarding the golf course, those conclusory allegations are also based upon a presumption of fraud and negligent misrepresentation. Again, the Club admitted and the majority opinion holds, that both of these claims were properly dismissed.

The golf course was completed in 1990, almost seven years prior to closing. The Club's members played the course the entire time. There is no allegation that Bradley and Proctor prevented any Club member from playing, inspecting, or from alleging the golf course was not of championship quality for those seven years prior to closing.

Item twelve states that Bradley's and Proctor's "acts" and "omissions" *breached* their fiduciary duties to the Club. The majority's opinion: (1) cites no fact, circumstance, act, or omission, individually or collectively, performed by Bradley and/or Proctor that constitutes a breach of their fiduciary duties owed toward the Club, (2) presumes fraud by virtue of concurrently acting as individuals and fiduciaries for two legal entities, and (3) assails the reputation of a licensed North Carolina attorney, solely because he was a "long-time" friend to one of the individual defendants. The majority's opinion presumes that the attorney would not honor his oath and duty. "Fraud is never presumed; and where it is alleged the facts sustaining it must be clearly made out." *Rice v. Metropolitan Life Ins. Co.*, 177 N.C. 128, 130, 98 S.E. 283, 284 (1919) (quotation omitted). Fraud must be specifically pled. N.C. Gen. Stat. § 1A-1. Rule 9(b) (2001). The Club failed to specifically allege any facts to make a showing of breach of fiduciary duty or fraud.

I would hold that the trial court properly dismissed the Club's claims for breach of fiduciary duty against Bradley and Proctor. Considering all of the facts and circumstances alleged as true and in the light most favorable to plaintiff, the facts disclosed in the complaint and exhibits insurmountably bar plaintiff's recovery on those claims.

B. Constructive Fraud

The majority's opinion states that Bradley and Proctor owed the Club fiduciary duties because they were directors and officers of the

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Club, which they created and started from its inception, as the Developers. Presuming this to be true, I do not agree that the Club pled sufficient allegations of facts and circumstances to show that Bradley and Proctor took advantage of, and wrongly benefitted from, their positions of trust to constitute constructive fraud.

The majority's opinion erroneously bootstraps the constructive fraud claim with the breach of fiduciary duty claim under the facts in this case. I separately analyze the Club's constructive fraud claim.

To survive a Rule 12(b)(6) motion to dismiss on constructive fraud, a plaintiff must "allege *facts and circumstances* (1) which created the relation of trust and confidence, and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981) (quotation omitted) (emphasis supplied). While constructive fraud does not require the strict pleading requirements of actual fraud, *Patuxent Development Co. v. Bearden*, 227 N.C. 124, 128, 41 S.E.2d 85, 87 (1947) a plaintiff must allege some *facts and circumstances* leading toward the closing of the transaction in which defendant caused plaintiff damage by taking advantage of that position. Constructive fraud differs from actual fraud in that "it is based on a confidential relationship rather than a specific misrepresentation." *Terry*, 302 N.C. at 85, 273 S.E.2d at 678-79. "Implicit in the requirement that a defendant '[take] advantage of his position of trust to the hurt of plaintiff' is the notion that the defendant must seek his own advantage in the transaction; that is, the defendant must seek to benefit himself." *Barger*, 346 N.C. at 666, 488 S.E.2d at 224. "[I]n order for defendants to take advantage of plaintiffs, plaintiffs must be deceived." *Jay Group, Ltd. v. Glasgow*, 139 N.C. App. 595, 600, 534 S.E.2d 233, 236 (2000) (citing *Jordan v. Crew*, 125 N.C. App. 712, 720, 482 S.E.2d 735, 739, *disc. review denied*, 346 N.C. 279, 487 S.E.2d 548 (1997) (plaintiffs' constructive fraud claim was nonexistent because plaintiffs were never deceived by defendant, an essential element of both fraud and constructive fraud). The Club's complaint must allege facts and circumstances that show that the Developer sought to (1) take advantage of the Club, (2) wrongfully benefitted from the Club, and (3) deceive and, in fact, deceived the Club.

"The requirement of a benefit to defendants follows logically from the requirement that a defendant harm the plaintiff by taking advantage of their relationship of trust and confidence. Moreover, the requirement of a benefit to defendants is implicit throughout the

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cases allowing constructive fraud claims.” *Barger*, 346 N.C. at 667, 488 S.E.2d at 224-25 (fact that accountant and accounting firm obtained the benefit of their continued relationship with plaintiffs was insufficient to establish a claim for constructive fraud). “[I]t is not sufficient for plaintiff to allege merely that defendant had won his trust and confidence and occupied a position of dominant influence over him. Nor does it suffice for him to allege that the deed in question was obtained by fraud and undue influence.” *Rhodes v. Jones*, 232 N.C. 547, 548-49, 61 S.E.2d 725, 726 (1950) (citing *Privette v. Morgan*, 227 N.C. 264, 41 S.E.2d 845 (1947); *Nash v. Elizabeth City Hosp. Co.*, 180 N.C. 59, 104 S.E. 33 (1920)). “Essential fullness of statement must not be sacrificed to conciseness.” *Id.* at 549, 61 S.E.2d at 726 (citing *Hartsfield v. Bryan*, 177 N.C. 166, 98 S.E. 379 (1919)). Compare *Burgess v. First Union Nat’l Bank of North Carolina*, 150 N.C. App. 67, 73, 563 S.E.2d 14, 18 (2002) (quotation omitted) (citing *Terry*, 302 N.C. 77, 273 S.E.2d 674; *Barger*, 346 N.C. 650, 488 S.E.2d 215) (“This Court held that Loyd and Frank’s Estate ‘have proffered no evidence that First Union sought to benefit itself from its alleged fraud[,]’ this being an essential element of both active and constructive fraud”) and *Sharp v. Gailor*, 132 N.C. App. 213, 216, 510 S.E.2d 702, 704 (1999) (plaintiff came close to alleging constructive fraud, but was missing an allegation that Gailor took advantage of her position of trust for the purpose of benefitting herself, thus the acts alleged failed to state a claim for constructive fraud) with *Terry*, 302 N.C. at 84, 273 S.E.2d at 678 (held plaintiff’s complaint sufficient to state claim for constructive fraud when defendant used position of trust and confidence to take advantage of his ill brother and purchase his business at a price below market value); *Link v. Link*, 278 N.C. 181, 193, 179 S.E.2d 697, 704 (1971) (defendant husband took advantage of relationship with wife to obtain shares of stock as part of a separation agreement); and *Vail v. Vail*, 233 N.C. 109, 115, 63 S.E.2d 202, 207 (1951) (defendant son took advantage of relationship of trust to obtain deed to property from his mother).

The majority’s opinion lists thirteen assertions in the Club’s complaint as sufficient allegations of *facts and circumstances* to constitute a breach of a fiduciary duty, constructive fraud, and unfair and deceptive trade practices. These statements are extensively analyzed above.

The majority’s opinion does not show why these thirteen items, individually or collectively, are sufficient to withstand a Rule 12(b)(6) or Rule 12(c) motion to dismiss. The majority’s opinion instead con-

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siders the Club's reply to defendants' counter-claim to support its conclusion that Bradley and Proctor breached their fiduciary duties, constructively defrauded the Club, and engaged in unfair and deceptive trade. The majority's opinion attempts to buttress its conclusion with conclusory averments to negligent misrepresentation and intentional misrepresentation (fraud) that the Club concedes, and the majority's opinion holds, were properly dismissed.

These conclusory assertions from properly dismissed claims do not provide the facts and circumstances that are legally sufficient for the remainder of the Club's claims. Each assertion of the Club's complaint, either individually or collectively, fails to allege sufficient facts and circumstances to show that Bradley and Proctor took unfair advantage of the Club or attempted to secure an *improper* benefit for themselves by deceiving the Club or its members. The pleadings show that the Club's members (1) maintained complete, unrestricted access to all of the facilities, (2) played the golf course for seven years, (3) used the club house and all other facilities for four years, (4) had a board of directors, (5) had legal representation who owed an independent legal duty to represent the Club, (6) caused the Facilities to be inspected, (7) caused a repair or replace Disclosure "punch list" to be prepared, (8) caused all of the items on that Disclosure "punch list" to be repaired and or replaced, and (9) decided by majority vote to close on the transaction and accept the Facilities pursuant to the amended Agreement. Presuming all of the allegations in the Club's complaint as true, and viewing them in the light most favorable to the Club, none of those allegations show facts and circumstances that the Developers (1) took advantage of (2) improperly or illegitimately benefitted from their relationship of trust and confidence, or (3) deceived the Club or its members. The pleadings disclose a set of facts which bars recovery on constructive fraud.

C. Unfair and Deceptive Trade Practices

The trial court properly dismissed the Club's unfair and deceptive trade practices claim against Bradley and Proctor. As briefly stated earlier, the majority's opinion based its decision on the presumption that the Club's complaint sufficiently pled constructive fraud. Since I would hold that the complaint insufficiently pled constructive fraud, there is no independent showing that Bradley and Proctor committed any unfair or deceptive trade practice.

"It is well recognized . . . that actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and that a

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mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1." *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700, *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992) (citations omitted). A plaintiff must show " 'substantial aggravating circumstances attending the breach to recover under the Act, which allows for treble damages.' " *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 368, 533 S.E.2d 827, 833 (2000) (quotation omitted). The Club has failed to allege any substantial aggravating circumstances attending any alleged breach by Bradley or Proctor to support any independent claim for unfair and deceptive trade practices. I would affirm that portion of the trial court's order dismissing this claim.

III. The Club's Claims Against the Developers

A. Breach of Contract

The trial court properly dismissed the Club's breach of contract claim against the Developer. There are no allegations in the complaint, considered *in pari materia* with the facts disclosed in the exhibits attached to the complaint, to support the majority's holding that the disclaimers contained in the Agreement "were obtained from the Club illegitimately." All of the exculpatory language was included in the 1989 Agreement prior to the date that any members, other than Bradley and Proctor, joined the Club.

The Club has not alleged, and the majority's opinion has not held, that the Agreement or Amendment are ambiguous. The Agreement contained the following provision:

The Club Acknowledges and agrees that except as expressly set forth herein the Developer makes no representations concerning the extent, design, location, size, date of completion or the manner of operation of the Club Facilities or other assets, or the materials, furniture or equipment which will be used in the Club Facilities.

The Club agrees that the Club Facilities and any other assets acquired pursuant to this Agreement are sold, purchased, and accepted "where is, as is," and without recourse. The Developer disclaims and makes no representations or warranties . . . , express or implied, by fact or law, with respect thereto, including, without limitation, . . . the condition, design, date of completion, construction, accuracy, or completeness of the Club Facilities or

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other assets, and the future economic performance or operations of the Club Facilities or other assets, no claim shall be made by the Club relating to the condition, operation, use accuracy, or completeness of the Club Facilities or other assets or for incidental of [sic] consequential damages arising therefrom.

"Where the terms of the contract are not ambiguous, the express language of the contract controls in determining its meaning and not what either party thought the agreement to be." *Crockett v. Savings & Loan Assoc.*, 289 N.C. 620, 631, 224 S.E.2d 580, 588 (1976) (citations omitted). The Club made no allegation that the Agreement and the Amendment are ambiguous. "[I]t is the province of the Court to construe and not to make contracts for the parties." *Williamson v. Miller*, 231 N.C. 722, 727, 58 S.E.2d 743, 747 (1950) (citation omitted). The majority's opinion ostensibly rewrites the Agreement as amended. I would affirm the trial court's decision dismissing that portion of the complaint.

B. Breach of Implied Warranty of Good Faith

I disagree with the majority's opinion when it states that the "complaint contained sufficient allegations to support [a breach of implied warranty of good faith] claim" For the reasons outlined above, the complaint, when considered along with the facts and circumstances contained in the exhibits, fails to allege that the Developer engaged in any conduct other than in good faith and with fair dealing. The Developer could have enforced the original Agreement as written, "where is, as is." Evidence of good faith is demonstrated by the Developer's agreement to provide for an Amendment, which detailed numerous items to be repaired/replaced by Developer and provided the Club a remedy if the Developer failed to repair/replace those items. I would uphold the trial court's dismissal of that part of the complaint.

C. Unfair and Deceptive Trade Practices

The reasons stated above regarding defendants Bradley and Proctor are also applicable to the Club's claim against the Developer concerning unfair and deceptive trade practices. I would uphold the trial court's dismissal of that part of the complaint.

IV. Summary

The exhibits to the complaint show that the majority of the Club's members voted to approve the Amendments, thereby approving the

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original Agreement as restated therein, that included accepting the condition of all of the Facilities. The majority's opinion does not challenge or assail this fact.

The complaint also shows that the Club and its members used and inspected all of the Facilities, specifically listed various defects in the golf course, club house, maintenance areas, and swim and fitness center, and provided for their repair and/or replacement. The Club concedes in its brief that the trial court properly dismissed allegations of fraud or negligent misrepresentation against all defendants and does not argue that the Developer, Bradley, or Proctor (1) used fraud or strong arm tactics to dissuade inspection, or restricted the Club or its members' ability to inspect and discover any defect in any of the Facilities, or (2) procured any of the Club members' votes by fraud or deception. The Club was represented prior to closing by a board of directors and legal counsel, which could have prevented closing on the Agreement and exercised the "specific performance" clause in the Agreement to bring the Facilities up to proper standards prior to or after closing occurred.

V. Conclusion

After careful review, I do not agree with the majority's opinion that the Club has sufficiently pled the elements of breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices claims against Bradley and Proctor and breach of contract, breach of implied warranty of good faith, and unfair and deceptive trade practices against the Developer: (1) The Club made no factual or circumstantial allegations sufficient to survive a Rule 12(b)(6) or 12(c) motion regarding the Club's claims against Bradley, Proctor or the Developer, and (2) all of the facts and circumstances in the complaint, and the exhibits attached thereto, when considered as true, disclose a set of facts that creates an insurmountable bar which necessarily defeats all of the Club's claims.

The majority's opinion appears to find that (1) a fiduciary duty exists, even though it was unambiguously disclaimed, (2) a duty was breached, merely by holding concurrent offices in related entities and having friendship with an attorney, (3) breach of fiduciary duty automatically alleged constructive fraud, even though a fraud claim is not properly alleged, and (4) constructive fraud necessarily resulted in a claim for unfair and deceptive trade practices, where no allegations support that claim.

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The trial court properly held that these allegations were a house of cards that collapsed upon themselves. If any fiduciary duty was owed, and lawfully disclaimed, case dismissed. If a duty was owed and not disclaimed, but was not breached, case dismissed. If the contract was unambiguous and conveyed the Facilities “where is, as is,” case dismissed.

I would affirm the trial court’s order in its entirety. As to the portion of the majority’s opinion that reverses the trial court, I respectfully dissent.



IN MATTER OF THE APPEAL OF THE MAHARISHI SPIRITUAL CENTER OF AMERICA, 639 WHISPERING HILLS ROAD, SUITE 112, BOONE, NORTH CAROLINA 28607 FROM THE LISTING AND TAXATION OF THE HEREIN DESCRIBED PROPERTY BY WATAUGA COUNTY FOR 1999

No. COA01-644

(Filed 20 August 2002)

1. Taxation— ad valorem—educational exemption—ownership

The Property Tax Commission erred by determining that the Maharishi Spiritual Center did not meet the educational institution ownership requirement for a property tax exemption. N.C.G.S. § 105-278.4 does not require that an organization must meet formalities such as a degree, certification, or accreditation to be classified as an educational system, and the term “educational institution” easily accommodates the nature of the Spiritual Center’s organization.

2. Taxation— ad valorem—educational exemption—type of facilities

The Property Tax Commission erred by concluding that the Maharishi Spiritual Center did not meet the requirement for an educational exemption from property taxes in that the facilities were not of a kind commonly employed in or naturally incident to the operation of an educational institution. There was evidence that universities set aside places for mediation and there was no evidence that the Spiritual Center’s facilities are not the kind commonly employed by educational institutions.

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3. Taxation— ad valorem—educational exemption—facilities wholly used for education

The Property Tax Commission erred by determining that the Maharishi Spiritual Center did not meet the requirements for an educational exemption from property taxes in that the facilities are not wholly and exclusively used for educational purposes because some members use their compounds primarily for group meditation. There was evidence that the Spiritual Center offers a variety of courses in short-term and long-term meditation, Vedic Science, and Sanskrit, that the meditation sessions involve specific instructions from teachers, that students practice their techniques, review their techniques, and discuss their progress with instructors, and that there was a transmission of information at all of the programs.

4. Taxation— ad valorem—educational exemption—school

The Property Tax Commission erred by determining that property used by a girl's school operated by a transcendental meditation organization was not entitled to an educational property tax exemption where the school's courses included math, science, physical education, and the arts, the school was in full compliance with state laws concerning private schools, parents are deemed to have met the compulsory education requirements by sending their children to the school, the school grants diplomas, and graduates have attended college.

Judge TYSON dissenting.

Appeal by taxpayer from final decision entered by North Carolina Property Tax Commission on 27 December 2000. Heard in the Court of Appeals 13 March 2002.

Moore & Van Allen, PLLC, by Charles H. Mercer, Jr., John S. Hughes, and Reed J. Hollander, for taxpayer-appellant.

Parker, Poe, Adams & Bernstein, L.L.P., by Charles C. Meeker, Jason J. Kaus and Jeffery M. Hedrick, County Attorney, for Watauga County-appellee.

WYNN, Judge.

The Maharishi Spiritual Center challenges the North Carolina Tax Commission's finding that pertinent real and personal property owned by the Spiritual Center is not entitled to an educational

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exemption under N.C. Gen. Stat. § 105-278.4. Because we find that some of the Tax Commission's findings are not supported by substantial evidence in view of the entire record, we reverse and remand in part.

The Maharishi Spiritual Center operates as a North Carolina nonprofit corporation exempt from state corporate income and franchise tax, sales tax, and federal income tax as a Section 501(c)(3) nonprofit corporation. The articles of incorporation describe the Spiritual Center's corporate purposes to include providing a site for educational programs.

The Spiritual Center's real property consists of 61 parcels of land, totaling 550 acres in Watauga County. The real property is divided into two sections: (1) The western campus (men's campus) is used exclusively by men and contains a meditation hall, dining hall, a series of residential facilities and administrative offices; and (2) The eastern compound (women's campus) is used exclusively by women and also contains a meditation hall, and dining and residential facilities. In addition, the Heavenly Mountain Ideal Girls' School is located on the east campus. Two nonprofit corporations associated with the Spiritual Center also use the property: Maharishi Vedic Education Development Corporation, which is a Massachusetts nonprofit corporation that works with various schools and universities to develop and offer courses in Vedic education; and Maharishi Global Administration Through Natural Law, which is a California nonprofit corporation whose purpose includes promoting and establishing educational programs in Vedic Science, technology, and natural law. A for profit residential development called, Heavenly Mountain Resort, is located between the western and eastern sections but it is not owned by the Spiritual Center.

At the men's campus, 310 men participate in the long-term "Purusha" Program. The program includes a daily meditation session in the morning from 7:00 to 11:30, which includes transcendental meditation and advanced meditation programs. After lunch, they engage in fundraising or work for the nonprofit entities associated with the Spiritual Center; some teach shorter meditation courses. They gather for group meditation in the evening, they also attend educational presentations that are in-person or by videotape. Additionally, students read or study Vedic literature and have access to a Vedic library; receive instruction at least monthly from the Maharishi by teleconference; engage in discussions with professors from the Maharishi University of Management, a fully accredited uni-

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versity; receive videotape instructions on Vedic science, a branch of Indian knowledge with roots in Sanskrit and Eastern literature; and take classes in Sanskrit and study it on their own. The Spiritual Center also offers short term courses for men, which may last a few days to a couple of weeks. These courses include group practice of meditation along with lectures from Vedic scholars and scientists.

The programs offered on the women's campus include the Mother Divine Program, which is administered by the Maharishi Global Administration Through Natural Law. The educational program for the women is similar to the men's Purusha program. The Center also offers shorter women's courses including courses for degree credit through the Maharishi University of Management and short term courses in meditation, diet and nutrition, and mother-daughter topics.

The programs are open to all applicants; and, students are provided with food, lodging and access to the facilities. Students pay a fixed tuition; however, they are also asked to raise \$1,000 a month in funds to cover their room, board and costs of maintaining the Center. The Spiritual Center does not award formal diplomas or degrees.

The Heavenly Mountain Ideal Girls' School located on the East Campus is a fully accredited North Carolina non-public school, which is operated by Mother Divine and Maharishi Global Administration Through Natural Law. The school offers courses in grades 9 through 12, including, math, science, physical education and the arts. The school awards high school diplomas and some of the graduates have attended colleges and universities.

On 22 April 1999, the Watauga County Board of Equalization and Review denied the Spiritual Center's request for exemption from property taxes for 61 parcels of real estate and associated personal property. The Board also denied exemption for the Heavenly Mountain Ideal Girls' School and undeveloped property owned by the Spiritual Center. The Spiritual Center appealed to the Tax Commission. In its final decision, the Tax Commission made findings of fact and conclusions, and ruled that the Spiritual Center was not entitled to exemption from property taxes on educational, charitable or scientific grounds. The Spiritual Center appealed to this Court.

On appeal, our review of the decision by the Tax Commission is governed by N.C. Gen. Stat. § 105-345.2 (2001), which provides in pertinent part:

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On appeal the court shall review the record and the exceptions and assignments of error in accordance with the rules of appellate procedure, and any alleged irregularities in procedures before the Property Tax Commission, not shown in the record, shall be considered under the rules of appellate procedure.

(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional provisions; or
- (2) In excess of statutory authority or jurisdiction of the Commission; or
- (3) Made upon unlawful proceedings; or
- (4) Affected by other errors of law; or
- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

Thus, we review the Tax Commission's decision by conducting a review of the whole record. *See In re Atlantic Coast Conference*, 112 N.C. App. 1, 4, 434 S.E.2d 865, 867 (1993). In reviewing whether the whole record fully supports the Tax Commission's decision, this Court must evaluate whether the Tax Commission's judgment, as between two reasonably conflicting views, is supported by substantial evidence. *See In re Appeal of Perry-Griffin Found.*, 108 N.C. App. 383, 424 S.E.2d 212, *disc. review denied*, 333 N.C. 538, 429 S.E.2d 561 (1993); *see also Dixie Lumber Co. of Cherryville, Inc. v. N.C. Dep't of Env't, Health and Natural Resources*, 150 N.C. App. 144, 563 S.E.2d 212, 214 (2002). Substantial evidence must be "more than a scintilla or a permissible inference." *Wiggins v. N.C. Dep't of Human Resources*, 105 N.C. App. 302, 306, 413 S.E.2d 3, 5 (1992) (citing *Thompson v. Bd. of Educ.*, 292 N.C. 406, 233 S.E.2d 538 (1977)). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Tate Terrace Realty Investors*,

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Inc. v. Currituck County, 127 N.C. App. 212, 218, 488 S.E.2d 845, 849 (1997). In determining whether the evidence is substantial, we must

take into account whatever in the record fairly detracts from the weight of the [Tax Commission's] evidence. . . [T]he court may not consider the evidence which in and of itself justifies the [Tax Commission's] decision without [also] taking into account the contradictory evidence or other evidence from which conflicting inferences could be drawn.

In re Moses H. Cone Memorial Hosp., 113 N.C. App. 562, 571, 439 S.E.2d 778, 783 (1994) (citations omitted).

In applying the whole record test, the reviewing court must "take into account both the evidence justifying the agency's decision and the contradictory evidence from which a different result could be reached." *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982). "Finally, the reviewing court must determine whether the administrative decision had a rational basis in the evidence." *King v. N.C. Envtl Management Comm.*, 112 N.C. App. 813, 816, 436 S.E.2d 865, 868 (1993).

Moreover, when a statute provides for an exemption from taxation, any ambiguities therein are resolved in favor of taxation. *See Aronov v. Secretary of Revenue*, 323 N.C. 132, 140, 371 S.E.2d 468, 472 (1988), *cert. denied*, 489 U.S. 1096 (1989) (holding that statutory exemptions from property taxes are strictly construed against exemption); *see also in re Worley*, 93 N.C. App. 191, 195, 377 S.E.2d 270, 273 (1989). Furthermore, when a matter comes before the Tax Commission, it is the taxpayer's burden to prove that the property is entitled to an exemption. *See In re Southeastern Baptist Theological Seminary, Inc.*, 135 N.C. App. 247, 249, 520 S.E.2d 302, 304 (1999). This burden "is substantial and often difficult to meet because all property is subject to taxation unless exempted by statute of statewide origin." *Id.*

I.

The Spiritual Center argues that it is entitled to exemption of its property under N.C. Gen. Stat. § 105-278.4 because the property is used for an educational purpose. Applying the whole record test, we find that the evidence does not support the Tax Commission's finding that the Spiritual Center is not entitled to an exemption for subject developed property from ad valorem taxes on educational grounds.

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N.C. Gen. Stat. § 105-278.4 (2001) provides that:

Buildings, the land they actually occupy, and additional land reasonably necessary for the convenient use of any such building shall be exempted from taxation if:

- (1) Owned by an educational institution (including a university, college, school, seminary, academy, industrial school, public library, museum, and similar institution);
- (2) The owner is not organized or operated for profit and no officer, shareholder, member, or employee of the owner or any other person is entitled to receive pecuniary profit from the owner's operations except reasonable compensation for services;
- (3) Of a kind commonly employed in the performance of those activities naturally and properly incident to the operation of an educational institution such as the owner; and
- (4) Wholly and exclusively used for educational purposes by the owner or occupied gratuitously by another nonprofit educational institution (as defined herein) and wholly and exclusively used by the occupant for nonprofit educational purposes.

The wording and the construction of N.C. Gen. Stat. § 105-278.4 make it clear that there are four separate and distinct requirements which the Spiritual Center must meet to qualify for an educational exemption. See *In re Atlantic Coast Conference*, 112 N.C. App. at 4, 434 S.E.2d at 867. Initially, we point out that the second requirement of § 105-278.4 is not disputed by the Tax Commission or by the County of Watauga—the Spiritual Center is not organized for profit; it is in fact, a nonprofit organization.

A. Owned by an educational institution

[1] In its fourth conclusion of law, the Tax Commission determined that the Spiritual Center did not meet the first requirement of § 105-278.4 stating that “[t]he Spiritual Center’s facilities are not owned by an educational institution such as a university, college, library or museum.” In support of this conclusion, the Tax Commission found that the

Spiritual Center does not have a faculty, nor does it provide a course of study or grant degrees. The Spiritual Center is not accredited as a college or university. Foreign members of the Purusha come to the United States on visitors’ visas, not student

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visas. Members of the Purusha and Mother Divine do not graduate from the Spiritual Center and may stay indefinitely.

“While our courts have consistently held that tax exemption statutes must be strictly construed against exemption, they have also held that such statutes should not be given a narrow or stingy construction.” *In re Wake Forest Univ.*, 51 N.C. App. 516, 521, 277 S.E.2d 91, 94, *review denied*, 303 N.C. 544, 281 S.E.2d 391 (1981); *see also Southminster, Inc. v. Justus*, 119 N.C. App. 669, 674, 459 S.E.2d 793, 796 (1995). N.C. Gen. Stat. § 105-278.4 does not require in the plain language of the statute that to be classified as an education institution, an organization must meet certain formalities such as a degree or certification, or accreditation.

The Spiritual Center argues that it is the record owner of the property and its articles of incorporation describe the corporate purpose to include providing a site for educational programs. The articles of incorporation for the Spiritual Center state that

[t]he corporation is organized exclusively for charitable, religious, educational, and scientific purposes . . . and, specifically to, create a home for world peace professionals practicing the Transcendental Meditation and Transcendental Meditation Sidhi Programs to help create world peace and harmony in the United States and the world and *to create and offer to the public, and those living in the community, education programs* in developing higher states of consciousness through Maharishi’s Vedic Science.

(emphasis added).

Stephen Souza, vice president of the Spiritual Center, testified at the hearing before the Tax Commission that the Spiritual Center teaches transcendental meditation, advanced meditation such as TM-Sidhi and other courses. Also, at the hearing, several experts testified that the Spiritual Center was an educational institution. Dr. Maya McNeilly, a psychologist, who is an adjunct professor at Duke University Medical Center, testified that Duke University is not unique in giving college credit for courses where people are spending their time meditating. She pointed out that “other universities such as University of Massachusetts at Amherst . . . UNC does, University of Arizona does, Harvard does, I believe Stanford does, and UCLA might. And there are probably others that I’m just not aware of.”

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Dr. Dale T. Snauert, a professor in the Department of Education Studies at Adelphi University testified that the Spiritual Center is similar to a university, college, school or seminary.

The Spiritual Center, has from my reading of it, a defined set of purposes, which are education. They have education goals and those goals . . . the fulfillment of those goals are the reason of existence for the Spiritual Center, just as the reason a university, college, school would have specialized, formalize, public goals and objective . . . The Spiritual Center has a curriculum as far as I can tell. It has an administrative structure. It has a governing body, a board of trustees, I believe. It has facilities that are devoted to the fulfillment of the educational purposes. It engages in various pedagogical practices, seminars, teaching functions of various kinds. So, . . . the Spiritual Center meets the criteria of my definition of an educational institution.

We hold that even construed strictly the term educational institution easily accommodates the nature of the Spiritual Center's organization. Accordingly, we hold that the Tax Commission erred in concluding that the Spiritual Center was not a educational institution.

B. The premises must be of a kind commonly employed for educational activities by similar institutions

[2] The Tax Commission also concluded that the Spiritual Center did not meet the third requirement of § 105-278.4 stating that “[t]he Spiritual Center’s large meditation facilities and two to four room residential suites are not of a kind commonly employed in or naturally and properly incident to the operation of an educational institution.”

In its findings of fact supporting this conclusion, the Tax Commission stated that “the property under appeal consists of 61 parcels of real property and associated personal property in numerous structures, including meditation, dining, residential and office facilities.” However, the Tax Commission presented no contrary evidence and we find no evidence in the record to show that the Spiritual Center’s facilities are not the kind commonly employed by educational institutions.

Indeed, the record on appeal shows that other universities, such as Duke University, set aside places for people to meditate. Dr. McNeilly testified that “appropriate space needs to be identified that will facilitate and support the learning and the transmission of knowl-

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edge and then the practicing of skills. The actual meditating is part of the education.” Dr. McNeilly also testified at the hearing that

Everything that I have seen, heard and read is very consistent with what happens in other academic institutions where meditation is taught, academic institutions meaning universities like Duke, like UNC, like actually most medical centers—Harvard, Stanford, University of Arizona and so on—that’s what’s happening there is . . . a curriculum and there are objectives—educational objective that are clearly delineated and that are practiced along the lines of developing skills to then accomplish those objectives.

In light of this evidence, we hold that a review of the whole record fails to show substantial evidence supporting the Tax Commission’s determination that the Spiritual Center did not meet the third requirement of § 105-278.4.

C. Wholly and exclusively used for educational purposes

[3] The Tax Commission also determined that the Spiritual Center did not meet the fourth requirement of § 105-278.4 stating that “[t]he Spiritual Center’s facilities are not wholly and exclusively used for educational purposes because members of the Purusha and Mother Divine use their compounds primarily for the group practice of meditation.”

In support of this conclusion, the Tax Commission found that:

2. As of the tax valuation date January 1, 1999, the western compound was occupied and used by over 300 single men who compose a group that the Spiritual Center calls the Purusha. The members of the Purusha meditate eight hours a day, from 7:00 a.m. to 11:45 a.m. and from 4:30 p.m. to 7:45 p.m. Purusha members meditate as a group in a large meditation hall. On the Spiritual Center’s premises in the afternoons, the Purusha also telephone their sponsors for contributions and undertake personal business and/or administrative office work. This group meditation occurs each day of the year, and many of the Purusha have been members since the group formed 20 years ago.

3. Members of the Purusha also attend an evening program from 8:30 p.m. to 9:15 p.m. This time is for, among other matters, viewing video tapes, teleconferencing with Maharishi Yogi who resides in Holland, and discussing matters concerning meditation.

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4. Single women occupy and use the eastern compound. The women reside in two to four room residential suites. A group of over 100 women are members of what is called the Mother Divine as of January 1, 1999. The Mother Divine engage in the daily practice of group meditation similar in duration to the Purusha. Individuals remain members of the Mother Divine for years.

5. The Purusha and Mother Divine are experienced practitioners of Transcendental Meditation and TM-Sidhi programs. The TM-Sidhi is an advanced meditation program. In the United States individuals may take a course to learn the Transcendental Meditation technique for a fee. The content of this is confidential, and individuals who take this course agree not to disclose its contents. The Transcendental Meditation is trademarked and is learned in a seven-step procedure occurring over seven days. At the end of those steps, the individuals attending the course have learned to meditate as efficiently and correctly as someone who has been practicing for 20 years.

6. During the extended daily periods of group meditation, the Purusha and Mother Divine focus on a Mantra, which is a sound that has no meaning. In focusing on the mantra, the meditator's mind becomes "settled down" and is not contemplative. The meditator's bodies are at rest, usually with their eyes closed. The surroundings in the Spiritual Center's meditation facilities are quiet during group meditation.

7. No information is transmitted to the Purusha and Mother Divine during their group practice; training or development of knowledge or skills is not the primary activity because the Purusha and Mother Divine are already experienced in meditation.

8. After meditating, members of the Purusha and Mother Divine from time to time make notes of their experience and compare their experiences with those of others by reading ancient literature.

N.C. Gen. Stat. § 105-278.4(f) (2001) defines an "educational purpose" as

one that has as its objective the education or instruction of human beings; it comprehends the transmission of information and the training or development of the knowledge or skills of individual persons. The operation of a golf course, a tennis court,

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a sports arena, a similar sport property, or a similar recreational sport property for the use of students or faculty is also an educational purpose, regardless of the extent to which the property is also available to and patronized by the general public.

The County of Watauga and the dissent rely on our Court's holding in the Matter of the Appeal of Chapel Hill Day Care Center, *Incorporated*, 144 N.C. App. 649, 551 S.E.2d 172 (2001), as authority for the position that the Spiritual Center is not entitled to an exemption under N.C. Gen. Stat. § 105-278.4. In *Chapel Hill Day Care Center*, we held that the child care center was custodial rather than educational and therefore not eligible for a property tax exemption for educational institutions. Our Court pointed out that "[t]here was ample evidence in the record from which the Tax Commission could conclude that the [day care center] is not a traditional school and is not [w]holly and exclusively used for educational purposes." *Id.* at 658, 551 S.E.2d at 178.

We find the present case readily distinguishable and not analogous to *Chapel Hill Day Care Center*. In this case, the Spiritual Center is a residential center, which offers training to adults in meditation in short and long term courses. Unlike the child care center in *Chapel Hill Day Care Center*, the Spiritual Center is not a custodial program but is a facility that offers training by self-study, lecture and practical experience. Moreover, the record shows substantial evidence that the training or development of skills of individuals occurs at the Spiritual Center. The Spiritual Center provides instructional sessions and teleconferences on Vedic Sciences, and meditation teachers instruct on Sanskrit and Vedic Sciences. Thus, we find that *Chapel Hill Day Care Center* does not control here.

Moreover, the dissent's comparison to *In re North Carolina Forestry Foundation, Incorporated*, 296 N.C. 330, 250 S.E.2d 236 (1979), fails to note the obvious difference, between a nonprofit foundation's forest property being primarily used as a commercial property by a paper company in which the paper company was given operational control over the forest, and the case at bar, where nonprofit organizations, that work with various schools and universities, run educational programs for men, women, and young girls. Thus, applying the whole record test, we find substantial evidence in the present case showing the use of the Spiritual Center's property as educational. The record indicates that the Spiritual Center offers a variety of courses in short-term and long-term meditation, Vedic

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Science and Sanskrit through live and videotape formats. The meditation sessions involve specific instructions from teachers. Basic transcendental meditation may be learned in seven days, however increased study leads to better proficiency. Dr. McNeilly, who teaches meditation courses at Duke University, testified as an expert at the hearing that the Spiritual Center is “an academic institution that continues to train and educate people who are learning.”

The record also indicates that participants practice meditation techniques, review their techniques in light of Vedic Science, discuss their progress with instructors and study Sanskrit. Dr. McNeilly explained, at the hearing that learning meditation is no different than learning

medicine or psychology or, to my knowledge, law, taxes. At the beginning stages, you spend a good bit of time perhaps with an instructor, with a professor. They talk to you, they lecture, you attend lectures. You might see videotapes, you might engage in discussions, study sections and so on . . . but as time progresses that contact diminishes and progressively diminishes the more advanced you get in the discipline.

She described how meditation classes are taught at Duke University, “[w]e give the student less and less guidance, if you will, because then the focus of the education turns to them learning on their own by doing it.”

Dr. David Orme-Johnson, a psychologist, past chairman of the Department of Psychology at the Maharishi University of Management, testified that transcendental meditation and Vedic science and technology arise out of the Indian Eastern tradition that is

an oral tradition and it’s learned on a one-on-one basis between teacher and student. And the reason for that is because everybody’s experience is different, and . . . the teacher imparts some information and the student practices that and then gives feedback on what happened . . . it’s a personal learning process that’s tailored to that individual’s particular responses to the instruction, and that’s why it has to be one-to-one basis and not put in a book.

Dr. Orme further testified that participants are learning while meditating “because they are developing deeper experiences of their own consciousness and fabrics of their consciousness.” The basic part is

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“while they are meditating, having the experience, and then comparing it with the literature is the second part—second phase of it.” Dr. Orme also testified that based on his professional knowledge of education and based on his knowledge of the Spiritual Center that the Purusha and Mother Divine program and the Ideal Girls School were involved in educational activities. He also opined that there was a transmission of information taking place at all of the programs.

In addition, at the hearing, Dr. Verne Bacharach, a professor of psychology, who testified for the County, stated under cross-examination that transcendental meditation was an educational experience. He also acknowledged that during his deposition testimony that he had no opinion about whether the transmission of information or knowledge about transcendental meditation techniques results in the knowledge or skills of individual persons or is educational.

Accordingly, in applying the whole record test, we find that the evidence does not support the Tax Commission findings and conclusions of law. To the contrary, the record shows substantial evidence that the Spiritual Center met the four separate and distinct requirements in order to qualify for an educational exemption under N.C. Gen. Stat. § 105-278.4.

II.

The Spiritual Center also challenges the Tax Commission's determination that its undeveloped property was not entitled to an educational exemption under N.C. Gen. Stat. § 105-278.4(b). Since the Tax Commission denied exemption for the Spiritual Center's developed property, it did not determine whether the amount of undeveloped acreage involved was “reasonably necessary” for the use of the developed property, which we hold today is entitled to the educational exemption. Thus, we remand this issue to the Tax Commission to determine whether the undeveloped land is “reasonably necessary” for the use of the exempted property and therefore should be entitled to an education exemption under N.C. Gen. Stat. § 105-278.4(b).

[4] Finally, we conclude that the Spiritual Center is entitled to an educational exemption for the property used by the Ideal Girls School. N.C. Gen. Stat. § 105-278.4(c) provides in pertinent part:

Notwithstanding the exclusive-use requirements of subsections (a) and (b), above, if part of a property that otherwise meets the requirements of one of those subsections is used for a purpose that would require exemption if the entire property were

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so used, the valuation of the part so used shall be exempted from taxation.

The statute expressly provides for partial exemption where a discrete part of a larger property is used for tax exempt purposes. The record shows that Maharishi Global Administration Through Natural Law, which operates the school is a California nonprofit corporation whose purpose includes promoting Vedic Science and technology, and natural law, and establishing educational programs.

Moreover, there was testimony at the hearing that the Maharishi Global Administration Through Natural Law has been teaching transcendental meditation and related programs for the past 41 years. It was also clear from the record that the Heavenly Mountain Ideal Girls' School is an educational institution that is being used for educational purposes. The courses offered by the school, for grades 9 through 12, include math, science, physical education and the arts. The Girls' School is in full compliance with state law relating to private schools, and parents who send their children to the school are deemed to have met the state's requirements for compulsory education. Moreover, the school grants high school diplomas, and graduates have attended Wellesley and Colorado Colleges, and other post-secondary institutions.

In sum, we reverse the Tax Commission's determination that the subject developed property and the Heavenly Mountain Ideal Girls' School is not entitled to the educational exemption authorized by N.C. Gen. Stat. § 105-278.4. We further remand to determine whether the undeveloped property of the Spiritual Center is "reasonably necessary" for the use of the exempted property and therefore should likewise be exempted.

Reversed in part; remanded in part.

Judge HUDSON concurs.

Judge TYSON dissents.

TYSON, Judge, dissenting.

The majority did not properly apply the standards for judicial review of decisions of the North Carolina Property Tax Commission ("Commission") and has ignored the burden imposed on the taxpayer by N.C. Gen. Stat. § 105-282.1. Accordingly, I respectfully dissent.

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The Spiritual Center contends and the majority finds that the Commission's findings and conclusions are unsupported by competent, material and substantial evidence. This standard of review is known as the "whole record" test. N.C. Gen. Stat. § 105-345.2(5) (2001). The whole record test is not "a tool of judicial intrusion." *Rainbow Springs Partnership v. County of Macon*, 79 N.C. App. 335, 341, 339 S.E.2d 681, 685 (1986) (quoting *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979)). This test does not allow a reviewing court to substitute its own judgment in place of the Commission's judgment even when there are two reasonably conflicting views. *Id.* at 341, 339 S.E.2d at 684. The whole record test merely allows a reviewing court to determine whether the decision of the Commission is supported by substantial evidence. *Id.* at 341, 339 S.E.2d at 685.

"Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *Thompson v. Wake County Board of Education*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977)). "The credibility of the witnesses and resolution of conflicting testimony is a matter for the administrative agency to determine." *In re Appeal of General Tire, Inc.*, 102 N.C. App. 38, 40, 401 S.E.2d 391, 393 (1991) (citing *Commissioner of Insurance v. Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300-01 (1980)). This Court cannot overturn the Commission's decision if supported by substantial evidence. *Rainbow Springs*, 79 N.C. App. at 343, 339 S.E.2d at 686.

The Spiritual Center argues that it is entitled to an educational exemption. The statute sets forth four separate and distinct requirements which a taxpayer must prove to qualify for an education exemption from taxation:

- (1) Owned by an educational institution (including a university, college, school, seminary, academy, industrial school, public library, museum, and similar institution);
- (2) The owner is not organized or operated for profit and no officer, shareholder, member, or employee of the owner or any other person is entitled to receive pecuniary profit from the owner's operations except reasonable compensation for services;
- (3) Of a kind commonly employed in the performance of those activities naturally and properly incident to the operation of an educational institution such as the owner; and

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(4) Wholly and exclusively used for educational purposes by the owner or occupied gratuitously by another nonprofit educational institution (as defined herein) and wholly and exclusively used by the occupant for nonprofit educational purposes.

N.C. Gen. Stat. § 105-278.4(a) (2001). The majority opinion correctly states that the taxpayer seeking exemption from property taxes has the burden of establishing entitlement to such an exemption. N.C. Gen. Stat. § 105-282.1(a) (2001).

I. Spiritual Center

The Commission concluded that the Spiritual Center's facilities are not wholly and exclusively used for educational purposes. The dispositive issue is whether this conclusion and the Commission's findings of fact are supported by substantial evidence.

The majority's opinion focuses on the expert testimony presented by the Spiritual Center and holds that this testimony was substantial evidence that the Spiritual Center met the fourth requirement to qualify for an exemption for educational purposes under N.C.G.S. § 105-278.4. Presuming this testimony is substantial evidence, the majority misapplies our standard of review. Such evidence would not warrant reversal of the Commission if there is any evidence of substance which tends to support the Commission's findings and conclusions. This Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary. *See In re Appeal of Perry-Griffin Found.*, 108 N.C. App. 383, 393, 424 S.E.2d 212, 218 (1993) (this Court is not permitted to replace the Commission's judgment with its own judgment even when there are two reasonably conflicting views).

In this case, the Commission received conflicting expert testimony regarding whether the practice of meditation eight hours a day by the Purusha and Mother Divine is an educational activity and whether the Spiritual Center is an educational institution. Dr. Orme-Johnson, a psychologist, testified that participants in meditation are learning. Dr. McNeilly, a professor of psychology, testified that the Spiritual Center is "an academic institution." On the other hand, Dr. Bacharach, a professor of psychology and qualified as an expert witness for Watagua County, testified that the Spiritual Center is not an educational institution and that while the teaching of the TM technique of meditation over a seven-day period is an educational or learning activity, the practice of meditation eight hours a day would

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not be a learning activity. The Commission weighed the credibility of the witnesses, accepted the testimony of Dr. Bacharach and necessarily rejected the testimony of the other experts. The testimony of Dr. Bacharach was sufficient to support the Commission's finding and conclusion that the Spiritual Center's facilities are not "wholly and exclusively" used for educational purposes.

The granting of exemption from taxation to some necessarily increases the tax burden on others. *See In re Appeal of Worley*, 93 N.C. App. 191, 195, 377 S.E.2d 270, 273 (1989). Accordingly, "[s]tatutes exempting specific property from taxation because of the purposes for which [the] property is held and used . . . should be construed strictly . . . against exemption and in favor of taxation." *Id.* (quoting *Harrison v. Guilford County*, 218 N.C. 718, 721, 12 S.E.2d 269, 272 (1940)). This does not mean that exemption statutes should be construed narrowly or stingingly, but simply means that "everything [should] be excluded from [the statute's] operation which does not clearly come within the scope of the language used" *Id.* (citation omitted).

The plain language of N.C.G.S. § 105-278.4(a)(4) states "[w]holly and exclusively used for educational purposes by the owner" (Emphasis supplied). Merely providing some short and long-term meditation courses, as well as Vedic Science and Sanskrit courses, does not qualify the Spiritual Center for exemption. Mr. Souza, a member of the Purusha and vice-president of the Spiritual Center, testified that: (1) the purposes identified in the Articles of Incorporation were to create a home for the world peace professionals or Purusha and Mother Divine members, to help create world peace and harmony through the Maharishi Effect, and to create and offer to the public, educational programs in developing higher states of consciousness, (2) 1,000 Purusha members is their goal because ancient texts suggest that this will have a profound effect on the environment through the Maharishi Effect, and (3) part of the purpose and current use of the meditation halls within the Spiritual Center is to create an "air of tranquility" or Maharishi Effect by having hundreds of experts in Maharishi's advanced Transcendental Meditation Sidhi program meditate as an amenity for the development of Heavenly Mountain Resort, which is situated between the two meditation halls. Thus, while the Spiritual Center does offer some educational activity that is not its primary purpose. The record clearly establishes that the primary purpose of the Spiritual Center is the practice of meditation by Purusha and Mother Divine members, many of which have been a part of their

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group for twenty years. *See In re Appeal of North Carolina Forestry Found., Inc.*, 296 N.C. 330, 250 S.E.2d 236 (1979) (nonprofit foundation owned a forest for the purposes of promoting improved forestry methods, forestry research, and education, but exclusive use element was not met because a paper company actually occupied and used the forest for commercial purposes, making the educational use merely incidental); *see also In re Appeal of Chapel Hill Day Care Center, Inc.*, 144 N.C. App. 649, 551 S.E.2d 172 (2001) (while some of the daycare's activities served to educate children enrolled, this was not enough to trigger tax exempt status under N.C.G.S. § 105-278.4 which requires an institution to have a "[w]holly and exclusively" educational purpose); *In re Appeal of Atlantic Coast Conference*, 112 N.C. App. 1, 434 S.E.2d 865 (1993) (athletic activities are a natural part of the education process and the role of the ACC is to promote college athletics).

II. Ideal Girls' School

The Commission further concluded that the buildings used in part by the Ideal Girls' School are not owned or occupied gratuitously by an educational institution, and thus not entitled to exemption. The Commission's findings and conclusion are supported by substantial competent evidence.

N.C. Gen. Stat. § 105-278.4(a)(1) requires that the property be "[o]wned by an educational institution (including a university, college, school, seminary, academy, industrial school, public library, museum, and similar institution)." I interpret the general phrase "educational institution" in relation to the express terms which follow it according to the dictates of *ejusdem generis*, a well established rule of statutory construction providing that " 'where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated.' " *State v. Lee*, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970) (citations omitted); *see also State v. Craig*, 176 N.C. 740, 744, 97 S.E. 400, 401 (1918) ("when particular and specific words or acts, the subject of a statute, are followed by general words, the latter must, as a rule be confined to acts and things of the same kind").

Here, the terms immediately following the phrase "educational institution" are usually, if not exclusively, aimed at education. The Ideal Girls' School is owned and operated by Maharishi Global

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Administration Through Natural Law (“MGANL”). Mr. Souza testified that the Restated Articles of Incorporation for MGANL state that the first purpose of the corporation is “to promote throughout the world knowledge that life is the ever-evolving expression of Natural Law;” the second purpose listed is “to bring an end to all problems and suffering throughout the world through Maharishi Vedic Science and Technology;” the third purpose is “to work closely with other organizations dedicated to the advancement of the Maharishi Sthapatya Veda to create ideal housing;” the fourth purpose listed is “to establish facilities to introduce programs of Natural Law to everyone through education, health, economy, administration; the fifth purpose is to accept, hold, invest, reinvest, administer any gifts, legacies, etc.,” and the sixth purpose listed is “to perform any and all lawful acts.” As with the Spiritual Center, the primary aim of MGANL is not education. In accordance with the dictates of *ejusdem generis*, I would conclude that the Ideal Girls’ School does not fall within the scope of “educational institution” as that phrase is used in N.C.G.S. § 105-278.4(a)(1).

III. Conclusion

Upon considering the record as a whole, the taxpayer failed to meet its burden of proof. I would hold that the findings, conclusions, and decision of the Property Tax Commission are supported by competent, material and substantial evidence and must be affirmed.

SARAH H. GRINDSTAFF, PLAINTIFF V. MICHELLE GRINDSTAFF BYERS AND
JONATHAN DEWAYNE BYERS, DEFENDANTS

No. COA01-803

(Filed 20 August 2002)

1. Child Support, Custody, and Visitation— custody—standing—grandparent—motion to dismiss

The trial court did not err by concluding that plaintiff maternal grandmother had standing to initiate an action for child custody on 28 February 2000 and by denying defendant father’s Rule 12(b)(6) motion to dismiss, because: (1) grandparents alleging unfitness of their grandchildren’s parents have a right to bring an initial suit for custody even if there is no ongoing custody proceeding; and (2) the allegations, including that defendant parents have not visited with the minor children on a regular basis and

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that defendants have not shown they are capable of meeting the needs of the children, state a claim upon which relief can be granted.

2. Child Support, Custody, and Visitation— custody—grand-parent—best interest of child

The trial court erred in a child custody case by performing a best interest of the child analysis between defendant father and plaintiff maternal grandmother and by granting plaintiff custody of the children based on the erroneous conclusion that defendant father acted inconsistently with his constitutionally protected status, because: (1) the trial court did not find that defendant abandoned his children, was unfit, or neglected the children; (2) it is inconsistent to grant the natural father full, free, and regular visitation and then conclude that he has acted inconsistently with his constitutionally protected status as a parent so as to forfeit that status; (3) there is no evidence to support the conclusions that defendant failed to be involved on a daily basis with the children or that he failed in his responsibilities and obligations of parenthood; (4) the record shows that the custody agreement leaving the children in the primary care of plaintiff maternal grandmother was temporary; (5) defendant maintained or attempted to maintain contact and support for his children, and he resumed custody when his circumstances permitted; (6) defendant voluntarily relinquished custody of the children to plaintiff since he believed at that time the interest of the minor children would be best served by placement with their grandmother, showing he put his children's interest ahead of his own; (7) defendant supported his children emotionally and financially despite the mother questioning defendant's fatherhood and plaintiff's refusing defendant visitation; and (8) the fact that a third party is able to offer the minor children a higher standard of living does not overcome a natural parent's paramount interest in the custody and control of the children.

Judge THOMAS dissenting.

Appeal by defendant from a final custody order entered 15 September 2000 by Judge Rebecca B. Knight in Buncombe County District Court. Heard in the Court of Appeals 18 April 2002.

Ingrid Friesen, P.A., by Ingrid Friesen, for plaintiff-appellee.

Richard L. McClerin for defendant-appellant.

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TYSON, Judge.

L. Facts

In the fall of 1991, Jonathan Dewayne Byers (“defendant”) and defendant Michelle Grindstaff Byers (“Michelle”) engaged in a sexual relationship. Taylor Carrington Byers was born 17 September 1992 as a result. Defendant and Michelle married in November 1994. Tyson Christianson Byers was born of the marriage on 22 February 1997. Defendant and Michelle separated on or about 10 October 1998 and divorced on 21 December 1998.

Defendant and Michelle had a tumultuous relationship and marriage. In December of 1998, Michelle left defendant and moved into her mother’s, Sarah G. Grindstaff’s (“plaintiff”), home with both children. Michelle and the children subsequently moved into a mobile home, provided by plaintiff, in January 1999. The children visited plaintiff regularly between January 1999 and March 1999. Michelle moved into an apartment in April of 1999. Michelle and plaintiff agreed that the apartment was unsuitable for the children. The children stayed with plaintiff in her home. Michelle would call and visit. Defendant presented evidence that Michelle denied him access to the children from October 1998 through February 1999.

Defendant, Michelle, and plaintiff voluntarily executed a Custody Agreement and Power of Attorney (“Custody Agreement”) on 18 May 1999. The Custody Agreement placed full care and custody of the children with plaintiff. At that time, defendant was working two jobs and did not have adequate room for the children. Michelle continued to live in an apartment unsuitable for the children.

The Custody Agreement: (1) stated that “the action of Mother and Father in performance of this agreement is not an act of abandonment of the minor children but rather demonstrates their desire to secure the best possible environment for the raising of the minor children,” (2) provided a visitation schedule for defendant and Michelle, and (3) required defendant and Michelle to voluntarily enter into a child support agreement, the amount to be determined by the Buncombe County Child Support Enforcement Agency (“Enforcement Agency”).

In June of 1999, defendant transferred with his employer to Mecklenburg County, North Carolina and moved into his parent’s home located in Charlotte. The Enforcement Agency contacted defendant concerning child support payments. Defendant requested

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DNA blood group testing as a condition before he would continue to pay child support. Defendant testified that Michelle had informed him that he was not the biological father of the children. The Enforcement Agency filed a complaint to recover child support ("Child Support Complaint") from defendant on 7 October 1999. Defendant filed a motion on 3 January 2000 requesting DNA testing. As a result of his DNA request, defendant's relationship with plaintiff became strained.

Defendant visited the children on 26 February 2000 with plaintiff's permission and transported the children back to Charlotte. Defendant called plaintiff that evening and informed her that he would not be returning the children to her. On 27 February 2000, defendant caused plaintiff to be served with a "Revocation of Power of Attorney" and "Revocation of Special Power of Attorney."

Plaintiff filed a verified complaint against defendant and Michelle on 28 February 2000 asking the trial court "to determine custody of the minor children . . . [p]ursuant to N.C.G.S. § 50A-204." That same day the trial court issued an *ex-parte* "Order for Immediate Custody" ("*Ex-parte* Order") granting plaintiff "immediate and temporary custody" pending a return hearing on all custody issues. The *Ex-parte* Order authorized law enforcement officials to "assist the Plaintiff in regaining the physical custody of the minor children."

Defendant filed a verified answer, counterclaims, and a motion to dismiss on 6 March 2000. The answer admitted that the trial court had jurisdiction to determine custody of the minor children pursuant to G.S. §§ 50-13.2 and 50A-201, but denied that the trial court had jurisdiction to determine custody pursuant to 50A-204.

Defendant counterclaimed for "immediate and temporary and permanent physical and legal custody of the minor children." Defendant moved to dismiss plaintiff's complaint pursuant to Rule 12(b)(6).

A hearing for temporary custody was conducted on 6 March 2000. Defendant's 12(b)(6) motion was denied and the trial court filed a "Temporary Order for Custody/Visitation and Child Support" on 19 April 2000 ("Temporary Order"). The Temporary Order (1) consolidated the prior Enforcement Agency's child support action, (2) concluded that defendant was "a fit and proper person to have liberal visitation with his minor children and that it is in the best interest of the children that an Order issue granting the defendant liberal visita-

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tion with the minor children,” (3) ordered that defendant and plaintiff have “temporary shared custody of the minor children with the children’s primary residence being with plaintiff Sarah Grindstaff,” (4) ordered defendant to pay \$411.00 per month child support, (5) ordered defendant liberal visitation establishing a “minimum visitation” schedule, and (6) retained jurisdiction over the parties “for purposes of modification and/or enforcement of this Order.” Plaintiff filed a reply to defendant’s counterclaim on 4 April 2000.

A custody trial was held in August of 2000. The trial court entered a final Custody Order (“Final Order”) making extensive findings of fact and conclusions of law and ordered that the “minor children . . . shall remain in the legal custody of Sarah Grindstaff.” The Final Order granted defendant and Michelle visitation, and ordered them to “pay child support as heretofore ordered by the Court.” Michelle, the children’s mother, filed no pleadings with the trial court and does not appeal. Defendant appeals. We reverse the trial court’s order and remand.

II. Issues

Defendant assigns as error the trial court’s (1) failure to grant his Rule 12(b)(6) motion to dismiss and (2) applying the best interest of the child standard when the evidence would not support a determination that he had acted inconsistently with his constitutionally protected status as natural parent.

III. Plaintiff’s Standing

[1] Defendant contends that plaintiff had no standing to initiate an action for custody on February 28, 2000 because no custody proceeding was ongoing and the minor children were in an “in-tact” family, and that plaintiff’s claims were fatally defective warranting a Rule 12(b)(6) motion to dismiss. We disagree.

G.S. 50-13.1(a) states that:

Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child

N.C. Gen. Stat. § 50-13.1(a) (2001). Our court previously held that grandparents alleging unfitness of their grandchildren’s parents have a right to bring an initial suit for custody, even if there is no ongoing custody proceeding. *Sharp v. Sharp*, 124 N.C. App. 357, 360-61, 477

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S.E.2d 258, 260 (1996). G.S. 50-13.1, “is intended to cover ‘a myriad of situations in which custody disputes are involved’ and its application is not ‘restricted to custody disputes involved in separation or divorce.’” *Id.* at 361, 477 S.E.2d at 260 (quoting *Oxendine v. Catawba Cty. Dept. of Social Services*, 303 N.C. 699, 706-07, 281 S.E.2d 370, 374-75 (1981)). We hold that plaintiff as grandmother of the children had standing to bring an action for custody.

“Although grandparents have the right to bring an initial suit for custody, they must still overcome the ‘constitutionally-protected paramount right of parents to custody, care, and control of their children.’” *Sharp*, 124 N.C. App. at 361, 477 S.E.2d at 260 (quoting *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905) (held that “absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail”). “While the best interest of the child standard would apply in custody disputes between two parents, in a dispute between parents and grandparents there must first be a finding that the parent is unfit.” *Sharp*, 124 N.C. App. at 361, 477 S.E.2d at 260 (citing *Petersen*, 337 N.C. at 401-02, 445 S.E.2d at 903-04).

Plaintiff’s complaint alleged in pertinent part that:

1. The Defendants have visited with the minor children but not on a regular and consistent schedule.
2. The Defendant have been [sic] preoccupied with their own lives and have not shown that they are capable of meeting the needs of the children for care and supervision.

When these allegations are viewed in the light most favorable to plaintiff and granting plaintiff the benefit of every reasonable inference, these allegations state a claim upon which relief could be granted. The trial court did not err by not granting defendant’s Rule 12(b)(6) motion to dismiss. This assignment of error is overruled.

IV. Best Interest Analysis

[2] Defendant contends that the trial court’s findings of fact do not support the legal conclusion that he acted inconsistently with his constitutionally protected status, and argues it was error for the trial court to perform a “best interest” of the child analysis. We agree.

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The trial court concluded that:

The custody agreement entered into by the parties specifies that the parents were not abandoning the children by allowing them to live in the home of Sarah Grindstaff. The court concludes as a matter of law that it was not abandonment. . . . [and] the parents [sic] conduct was not neglect or abandonment

The trial court then concluded however that:

The parents have acted inconsistently with respect to their constitutionally protected right with regard to their children and therefore the appropriate standard for this Court in determining the issues of custody and visitation are “the best interest” of the minor children in light of all the facts and all the circumstances.

The trial court made extensive findings of fact in support of this conclusion. After thorough review, none of these findings of fact support the legal conclusion that defendant has acted inconsistently with his constitutionally protected status as natural parent of the children. The trial court did not find that defendant (1) abandoned his children, (2) was unfit, or (3) neglected the children.

The Temporary Custody order concluded that defendant “is a fit and proper person” and ordered that defendant and plaintiff share “temporary custody.” *See Raynor v. Odom*, 124 N.C. App. 724, 478 S.E.2d 655 (1996) (held that trial court did not err in considering temporary custody orders in determining the issue of child custody).

The trial court’s Final Order found that (1) “[o]nce in Charlotte [with defendant], the visitations that have occurred have gone reasonably well and the children have been engaging with various family members,” (2) defendant is a reliable employee, (3) defendant has an excellent reputation at work, and (4) that defendant voluntarily placed the children in the home of plaintiff when he was unable to properly provide for them.

There is no evidence in the record showing that defendant acted inconsistently with his constitutionally protected status as the natural father. In its Temporary Order, the trial court concluded defendant was “a fit and proper person to have liberal visitation and that it is in the best interest of the children that an Order issue granting the defendant liberal visitation with the minor children” and awarded him “temporary shared custody of the minor children. . . .” with plaintiff. In its Final Order, the trial court granted defendant

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regular visitation. It is inconsistent to grant the natural father full, free, and regular visitation and then conclude that he has acted inconsistently with his constitutionally protected status as a parent so as to forfeit that status.

While there may be evidence to support the trial court's conclusions of law that defendant "willfully and intentionally left the children in the primary care of plaintiff," there is no evidence to support the conclusions that defendant "failed to be involved on a daily basis with the children," or that he "failed in [his] responsibilities and obligations of parenthood."

The conclusion that defendant "willfully and intentionally left the children in the primary care of plaintiff," under the facts of this case, is not sufficient to overcome defendant's constitutionally protected status.

Our Supreme Court has stated that:

there are circumstances where the responsibility of a parent to act in the best interest of his or her child would require a temporary relinquishment of custody, such as under a foster-parent agreement or during a period of service in the military, a period of poor health, or a search for employment. However, to preserve the constitutional protection of parental interests in such a situation, the parent should notify the custodian upon relinquishment of custody that the relinquishment is temporary, and the parent should avoid conduct inconsistent with the protected parental interests.

Price v. Howard, 346 N.C. 68, 83-84, 484 S.E.2d 528, 537 (1997).

"[I]f defendant and plaintiff agreed that plaintiff would have custody of the child only for a temporary period of time and defendant sought custody at the end of that period, she would still enjoy a constitutionally protected status absent other conduct inconsistent with that status." *Price*, 346 N.C. at 83, 484 S.E.2d at 537 (citing *Smith v. Organization of Foster Families*, 431 U.S. 816, 53 L. Ed. 2d 14 (holding that natural parents could not lose parental rights to foster parents where the foster agreement contemplates a surrender of custody for only a temporary period of time)).

The trial court did not make any finding of fact whether the Custody Agreement was temporary or permanent. The dissent states that "[w]hile the trial court did not find abandonment . . . such an

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agreement [the voluntary custody agreement] in itself fails to establish that there was no abandonment as a matter of law. Determination of abandonment is a factual issue which the court must make based upon the evidence presented at trial." The trial court expressly found however that defendant did not "abandon" or "neglect" the children by executing the Custody Agreement, and that "[t]here was no specified time that the children would remain in the custody of [plaintiff]." The trial court found that

[t]he parties understood and agreed that this arrangement was due to the fact that neither parent was capable of providing for the children in a suitable manner at that time. The father did not have adequate space for the children and his work hours were such that he would not be available to take care of the children.

Evidence exists in the record to show that the Custody Agreement was temporary. Defendant testified that it was his intent that the agreement was temporary. Michelle also testified that she thought the agreement was temporary. Plaintiff recognized the temporary nature of the agreement. In her complaint, plaintiff stated that she "does not intend to exclude the Defendants from having custody of the minor children at some time." The trial court's Final Order excluded defendant from having custody.

Plaintiff argues that defendant had:

no employment obligation to fulfill, no illness to overcome, and no task to complete. The parents surrendered the child with no clear justification for doing so, and no identifiable event would bring the parents to a state of readiness to have the children in their custody again. The parents merely resigned themselves to the belief that the children were better off with Sarah Grindstaff. This is not a situation worthy of the protection as contemplated by the *Price* court.

We disagree.

Price is not as narrow as plaintiff urges. The list of circumstances enumerated in *Price* is not exhaustive. "Such conduct would, of course, need to be viewed on a case-by-case basis, but may include failure to maintain personal contact with the child or failure to resume custody when able." *Price*, 346 N.C. at 83-84, 484 S.E.2d at 537.

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Here, the evidence showed that defendant maintained or attempted to maintain contact and support for his children, and that he resumed custody when his circumstances permitted. Defendant voluntarily relinquished custody of the children to the plaintiff because he believed at that time "the interest of [the] minor children would be best served by placement with Grandmother." This act shows that defendant put his children's interest ahead of his own. Defendant should not be penalized for this action when he requests the return of his children only nine months later after he is more established and settled. The Custody Agreement was executed on 18 May 1999. Defendant revoked plaintiff's power of attorney and special power of attorney on 27 February 2000. Moreover, there is evidence in the record that defendant began to request full custody and return of his children in June of 1999. Defendant testified that plaintiff told him that he could not resume custody of his children until they were eleven or twelve-years-old.

The dissent emphasizes the trial court's findings of fact that defendant (1) "did precious little to visit the children for months at a time," (2) refused to enter into the voluntary support agreement, and (3) requested "paternity tests."

The evidence at trial showed that plaintiff refused to allow defendant visits with the children. Defendant's attorney, Carol Goins ("Goins") testified that defendant told her in late 1999 or early 2000 that defendant could not visit the children because plaintiff "wouldn't allow the visits." Plaintiff refused defendant visitation with his children because defendant requested a paternity test. Defendant requested a paternity test because Michelle told defendant that he was not the biological father of the children on many occasions solely for spite. Defendant's request was not unreasonable under the circumstances, nor did it constitute action inconsistent with his constitutionally protected status. There is overwhelming evidence in the record that defendant supported his children emotionally and financially, despite Michelle's questioning defendant's fatherhood, and plaintiff's refusing defendant visitation.

Defendant testified that (1) after defendant and Michelle separated, Michelle refused defendant visitation, (2) defendant supported the children financially, (3) defendant had regular visitation with the children through June 1999 when they were living with plaintiff, (4) defendant accompanied the children to the doctor and dentist, (5) defendant paid \$3,017.50 for day care during 1999, (6) defendant maintained health insurance for the children and helped with their

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lunch money, clothing and medical expenses, (7) even when plaintiff refused to allow defendant to visit the children after he requested a paternity test, defendant continued to call the children regularly, (8) defendant requested return of the children in June of 1999, and plaintiff refused, (9) defendant wrote letters, sent gifts, and continued to maintain contact, (10) some letters were returned to defendant unopened, and (11) after defendant requested a paternity test, based on Michelle's revelation that defendant might not be the father of the children, plaintiff became angered and refused defendant visitation after he moved to Charlotte. We hold that there are no findings of fact that support the conclusion, and that there is no evidence in the record, that defendant acted inconsistent with his constitutionally protected status. The trial court erred by performing a "best interest" analysis as between defendant and plaintiff. "The fact that the third party is able to offer the minor child[ren] a higher standard of living does not overcome a natural parent's paramount interest in the custody and control of the child[ren]." *Penland v. Harris*, 135 N.C. App. 359, 362, 520 S.E.2d 105, 107 (1997) (citing *Petersen*, 337 N.C. 397, 445 S.E.2d 901).

Michelle, the children's mother, did not answer the complaint or file a counterclaim seeking custody. Defendant's counterclaim sought permanent custody of the children.

The record contains substantial evidence that plaintiff provided shelter, nurture, love, care and protection for her grandchildren at a time when both parents were unable to provide the children with life's necessities. We applaud plaintiff's actions, and understand the bond that develops between children and their extended family members, and the loss that is felt when daily interaction with the children ceases. Whatever may occur in the future, plaintiff has the singular pride and gratitude of her grandchildren for being there for them when they most needed stability in their lives. Both parents should well remember plaintiff's responsible actions on behalf of their children. Custody orders are subject to review if circumstances change or either natural parent engages in conduct that is inconsistent with their constitutionally protected status. *Sharpe*, 124 N.C. App. 357, 477 S.E.2d 258.

We reverse the order of the trial court granting plaintiff custody of the children and remand for entry of an order granting defendant custody of the children, and a hearing to determine reasonable visitation between plaintiff and Michelle as shall be in the best interests of the children.

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Reversed and remanded.

Judge MARTIN concurs.

Judge THOMAS dissents.

THOMAS, Judge, dissenting.

Because there is sufficient evidence for the trial court to find that defendant's actions were inconsistent with his constitutionally protected status as a natural parent, thus properly allowing a "best interest" analysis, I respectfully dissent.

Our Supreme Court has recognized that temporary relinquishment of custody by a parent in the best interest of a child may at times be necessary and does not constitute abandonment by the parent. *Price v. Howard*, 346 N.C. 68, 83-84, 484 S.E.2d 528, 537 (1997). Examples may include foster parent agreements and searches for employment. *Id.* However, the Court further noted that to preserve parental interests, the natural parent must inform the custodian that such custody is temporary and must avoid conduct inconsistent with the protected parental interest. *Id.* This determination is made on a case-by-case basis, but two specific examples of inconsistent conduct cited by the Court include failure to maintain personal contact with the child and failure to resume custody when able. *Id.*

Further, the constitutionally protected rights of a parent are closely connected to the responsibilities of parenthood. *Speagle v. Seitz*, 354 N.C. 525, 530, 557 S.E.2d 83, 86 (2001), *reh'g denied*, 355 N.C. 224, 560 S.E.2d 138, *cert. denied*, — U.S. —, — L. Ed. 2d — (2002). Failure to undertake such responsibilities may deprive an individual of the protection of parental rights.

[C]onduct inconsistent with the parent's protected status, which need not rise to the statutory level warranting termination of parental rights . . . would result in application of the "best interest of the child" test without offending the Due Process Clause. Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents. Where such conduct is properly found by the trier of fact, based on evidence in the record, cus-

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today should be determined by the “best interest of the child” test mandated by statute.

Price, 346 N.C. at 79, 484 S.E.2d at 534-35. Deprivation of personal contact and support by the parent are factors for the trial court’s consideration. “It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.” *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). Supporting its decision by the evidence in the record, the trial court determines what is inconsistent conduct. “There is no bright line rule to determine what conduct on the part of a natural parent will result in a forfeiture of the constitutionally protected status and trigger application of a ‘best interest’ analysis.” *Penland v. Harris*, 135 N.C. App. 359, 362, 520 S.E.2d 105, 107 (1999). Properly supported findings by the trial court are conclusive in custody cases even where the evidence may appear in conflict.

[I]n custody cases, the trial court sees the parties in person and listens to all the witnesses. This allows the trial court to “detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges.” Accordingly, the trial court’s findings of fact “‘are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary.’”

Adams v. Tessener, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (citations omitted).

In the present case, the trial court specifically determined that defendant’s actions and conduct were inconsistent with the best interests of his minor children. There are findings of domestic violence over the course of many years by defendant in the presence of the children, there are findings that such indefensible conduct emotionally harmed the children. There are findings that defendant was financially able to maintain custody of the children, but chose not to, and findings he could have supported the children while they were with plaintiff, but chose not to. There are findings the children were actually in plaintiff’s custody well before any custody agreement, and findings that defendant did precious little to visit the children for months at a time. There are findings that defendant eventually whisked the children to live with him in Charlotte, not only disrupting the children’s school and activities without notice or planning but

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also without telling his own parents and girlfriend, who were left to supervise them. The trial court's findings of fact include:

8. There were several instances throughout the relationship and marriage of the parties where babysitters or family friends would call the plaintiff . . . to come to the home of [defendant mother and father] in order to pick up [the children], because there were acts of domestic violence and fighting going on between [defendant mother and father] in the presence of the children [Incidents occurred] in 1993, . . . 1995, [and] . . . 1996 In September 1998, there was an incident of domestic violence where [defendant father] shoved [defendant mother] and law enforcement was called to the residence. [Defendant father] called the plaintiff, . . . and he told her he had hit [defendant mother] and that [plaintiff] needed to come and pick up [his daughter]. . . . There was an incident described where [the daughter] was hitting [defendant father] with her Barbie doll telling him to let go of her mother, who was pinned up against the wall In January 1999 there was an incident where the parents got in to [sic] an argument over the telephone. [Defendant mother] testified that [defendant father] made seventy-two telephone calls to her house that evening and came over to the house uninvited and was beating on the door.

9. The domestic violence between the parties began in the Spring of 1992 and continued throughout the relationship and marriage and subsequent to the divorce of the parties. Many of these instances were in the presence of the children and were detrimental to the welfare of the children. The parents were advised by family friends and by their parents to stop the acts of domestic violence. They were encouraged to attend counseling and referrals were made for counseling. The defendant parents did not stop committing acts of domestic violence in the presence of the children.

10. The testimony is overwhelming that the acts of domestic violence had a detrimental effect on the children and that it caused them significant emotional upset in every occasion of domestic violence between their parents in their presence.

11. From 1993 through May of 1999 the time that [the children] would spend with the [plaintiff] increased on a regular basis. The children began to spend more and more overnights in the home of the [plaintiff]. The parents would come to the home to visit the

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children or to pick them up for the afternoon or sometimes an overnight visit. By December 1998, the children were living primarily in the home of the [plaintiff] maternal grandmother with the consent of both [defendant] parents. When the parties separated in October of 1998, the [defendant] father moved in with a friend and did not have adequate accommodations for the children. The children did not have overnight visits at that time. In January of 1999, the [defendant] father was unavailable to parent the children on a regular basis . . . This schedule continued from January 1999 through June 1999.

13. The parties agreed to a custody agreement that was entered on May 18, 1999[.] . . . There was no dispute by either parent that [plaintiff] had been the primary caregiver for a significant period of the children's lives and that the children were well-bonded and comfortable and safe in her home.

14. The Child Support Enforcement Agency did make efforts for the parents to enter into voluntary support agreements contemplated in the custody agreement executed May 18, 1999 . . . When the father was contacted by the Child Support Enforcement Agency he stated he wanted paternity testing done before he entered into the voluntary support agreement. A complaint was filed by the Buncombe County Child Support Enforcement Agency on October 7, 1999[.] . . . When the issue of paternity was made known to [plaintiff] by the Child Support Enforcement Agency she became very angry with [defendant father]. The plaintiff's statements to [defendant father] were "how could you possibly do this to these children?" . . . The [defendant] father had no visits with the children at all through the fall of 1999. The [defendant] father had telephone contact with the children when he would call the residence but he did not speak to [plaintiff]. Frequently the father spoke to Melanie Grindstaff, the sister of [defendant mother], [who] was in the home during that period of time. Melanie would encourage [defendant father] to talk to [plaintiff] and encouraged him to visit the children but [defendant father] did not do either at that time.

15. In December of 1999, [plaintiff] took [daughter] to a cheer-leading competition in Charlotte, North Carolina. [Plaintiff] called Melanie . . . to get the phone number of [defendant father] so that she could invite [him] to visit with [his daughter] while she was at that competition in Charlotte. Melanie contacted [defendant father] and told him where [plaintiff] and [his daughter] were

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in Charlotte. [Defendant father] did go to that location and visited [his daughter] and [plaintiff] at the cheerleading competition. [Plaintiff] felt that her presence was creating some tension for [daughter] so she voluntarily left the facility for the afternoon in order to give [daughter] time to visit with her [defendant] father. [Defendant father] had the opportunity to discuss with [plaintiff] resumption of this visitation in Charlotte but he did not do so. [Defendant father] provided no explanation why he had not visited the children in such a long time and there was no discussion about what he would like to do in the future. During the fall of 1999 the relationship between the plaintiff grandmother and [defendant father] was strained because the [plaintiff] grandmother was so upset that the [defendant] father requested paternity testing. However, it was not to the point that it would have interfered in any way with his coming to her home to exercise visitation the way he had in the past. The [defendant] father's conduct in not visiting his children in the fall of 1999 was contrary to the best interest of his children and was inconsistent with his exercise of parental responsibilities and rights.

16. The next time [plaintiff] had any contact from [defendant father] was in February of 2000, when [defendant father] called and indicated he wanted to have visitation the weekend around February 22, 2000, because it was [his son's] birthday. [Plaintiff] told [defendant father] the visitation would be fine but [his daughter] had a national cheerleading competition in Atlanta that weekend. [Plaintiff] asked [defendant father] if he could have his visitation on the following weekend so [his daughter] could participate in the cheerleading competition in Atlanta. [Defendant father] agreed[.] . . . [Defendant father] was living in his parent's home at the time that he picked the children up in February 2000 and took them back to Charlotte. He did not tell his mother or his stepfather that he was going to bring the children back to their home to live with him fulltime. There were no arrangements made in advance for the children to live in the paternal grandparent's home. The children had not visited in that home in a long time. [Defendant father] was dating a woman named Adrian who also lived in Charlotte. From Saturday night, until the following Tuesday when the children were picked up, the children spent part of the time at the paternal grandparent's home and part of the time in Adrian's apartment. At the time the Sheriff's Department picked up the children they were at Adrian's resi-

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dence but [defendant father] was not with them. Adrian was not told by [defendant father] after he had picked up the children from the [plaintiff] grandmother that they were returning to Charlotte to live with him. Adrian had no idea of his plans to keep the children in advance . . . In that the [defendant] father had not exercised any visitation with the children from July of 1999 until February of 2000 (except for the one visit arranged by the [plaintiff] grandmother for the afternoon with [his daughter] in Charlotte in December of 1999) it was very inappropriate and irresponsible of him to take the children without any notice to the children or to the [plaintiff] grandmother or [defendant] mother or his mother or his girlfriend and attempt to relocate the children to Charlotte. This situation caused the children tremendous upset[.] . . . It was more difficult for [his daughter] because she was enrolled in school and there were no arrangements made for her to be enrolled in another school. [His daughter] had her cheerleading activities that were missed. [His daughter] was given no opportunity to make any kind of closure on her life in Buncombe County. The circumstances wherein law enforcement picked the children up from the girlfriends [sic] home when the father wasn't present was also very upsetting to the children and contrary to their best interests. It is the position of [defendant father] that he was their legal father and therefore he had the right to revoke his agreement to place custody with [plaintiff] at any time because he has a paramount right to the custody of his children as their natural parent.

23. Melanie spoke to [defendant father] several times after the paternity issue was raised and told [defendant father] that he needed to be seeing the children and told him specifically "Mom will let you see those kids if you want to."

25. [Defendant mother] acknowledges that [her daughter] began to spend approximately one to two overnights per week when she was an infant with [plaintiff] and that over the years that increased until the children were spending five to six nights[.]

The court also concluded:

4. The issue was not poverty that prevented the parents from parenting full-time because both parents were employed and both parents could have provided an adequate home on the monies that they were earning . . . While the parents conduct was not neglect or abandonment in the sense that they did not walk away

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from their children without making sure they were in a suitable place it was an act inconsistent with their obligation to parent their children and to be involved on a daily basis with the responsibilities and obligations of parenthood.

5. The conduct of the parents and their actions throughout the lives of these children has been inconsistent with their constitutionally protected status[.]

Based on these and other findings, the trial court concluded that both parents willfully and intentionally left the children in the primary care of plaintiff, an act inconsistent with their obligation to parent the children considering the parents' circumstances and abilities. The trial court further concluded that defendants father and mother failed to be involved on a daily basis with the children, and despite their capability to do so, failed in their responsibilities and obligations of parenthood. The findings of fact are more than merely sufficient to support this conclusion by the court. The trial court properly proceeded to determine the children's best interests.

Additionally, much is made of the May 1999 Custody Agreement stating that the agreement did not constitute abandonment by the parents. While the trial court did not find abandonment "in the sense that they did not walk away from their children without making sure they were in a suitable place," it should be emphasized that such an agreement in itself fails to establish there was no abandonment as a matter of law. Determination of abandonment is a factual issue which the trial court must make based upon the evidence presented at trial. A disclaimer by a parent to the effect that granting custody to a third party is not abandonment is insufficient to prevent the trial court from determining that, in fact, the minors had been willfully abandoned by their parents. For example, this Court has held that leaving children in foster care for an extended time period can constitute willful abandonment on the part of the parents, regardless of their good intentions in recognizing that the children were better off in such a situation. *In re Bishop*, 92 N.C. App. 662, 669, 375 S.E.2d 676, 681 (1989). A custody agreement alone cannot be appropriately utilized to show the parents' actions were not inconsistent with their constitutionally protected status, particularly where, as here, the parents actually forfeited custody to plaintiff well before the agreement.

I further dissent as to the majority's award of custody to defendant father. The trial court made the following finding:

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25. [Defendant mother] and [plaintiff] agree that [defendant mother's] circumstances have greatly improved and that she is capable of providing care for her children at this time. [Defendant mother] believes that she can provide for her children's care and wants to provide for her children's care but she expressed to the court that her children are in the home where they feel safe, protected, and comfortable and have spent the majority of their life. For that reason, although she wants the children to live with her, she is willing to allow them to stay in the grandmother's home if that is what they want to do. All reports are that when the children are with [defendant mother] and [defendant mother's fiancée] the visitations go well and that there are no problems.

The preceding is not structured as a finding of ultimate facts, but as between the parents, the issue of custody clearly remains viable. Although the mother failed to submit pleadings and, indeed, testified that her mother should have custody, this does not preclude the court's consideration of her as the proper custodian as opposed to defendant father. Under section 50-13.2(a), the court is authorized to award custody to such a "person . . . as will best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a) (2001). "In a custody proceeding between two natural parents . . . the trial court must determine custody based on the 'best interest of the child' test." *Adams*, 354 N.C. at 61, 550 S.E.2d at 502.

In *In re Branch*, the paternal grandparents filed for custody of their grandchildren, naming the maternal grandparents and father as respondents. *Branch*, 16 N.C. App. 413, 414, 192 S.E.2d 43, 44 (1972). The petition was answered by the maternal grandparents only. *Id.* The court awarded custody of the children to the respondent father, who had appeared at the custody hearing and was subject to the court's orders. *Id.* at 416, 192 S.E.2d at 45. On appeal, this Court upheld the award, noting, "that the court was fully authorized to award him custody of the children although he had filed no pleading asking for their custody." *Id.*

As with the respondent in *Branch*, the mother here was named as a defendant, appeared and testified at the hearing. She is subject to the orders of the court. As between the two natural parents in this case, the trial court has not yet determined best interests.

Accordingly, I respectfully dissent and vote to affirm the trial court's award of custody to plaintiff.

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DIANA WELLS, PLAINTIFF V. NORTH CAROLINA DEPARTMENT OF CORRECTION, A DEPARTMENT OF THE STATE OF NORTH CAROLINA, STATE OF NORTH CAROLINA, THEODIS BECK, SECRETARY OF THE DEPARTMENT OF CORRECTION, DUNCAN DAUGHTRY, INDIVIDUALLY AND AS SUPERINTENDENT OF THE DEPARTMENT OF CORRECTION, NEWPORT BRANCH, AND ANTHONY FLORENCE, INDIVIDUALLY AND AS SUPERVISOR OF THE DEPARTMENT OF CORRECTION, NEWPORT BRANCH, DEFENDANTS

No. COA01-1199

(Filed 20 August 2002)

1. Public Officers and Employees— workplace harassment— Whistleblower action

The trial court did not err by determining that plaintiff's Whistleblower action was properly before the court rather than the State Personnel Commission where the action arose from workplace harassment. N.C.G.S. § 126-36(b) provides plaintiff with the right to appeal directly to the State Personnel Commission but does not bar a Whistleblower action. N.C.G.S. § 126-84 et seq.

2. Employer and Employee— workplace harassment—analytic model—pretext rather than mixed-motive

The trial court properly addressed plaintiff's Whistleblower action under a pretext model rather than a mixed-motive model where plaintiff did not present any clear signs that the alleged adverse employment action was directly related to her sexual harassment complaint. The trigger for use of the mixed motive model is evidence of conduct or statements that reflect directly the alleged illegitimate criterion and that bear directly on the contested employment decision. A mixed motive does not exist simply because a wrongful motive might be inferred from a prima facie case.

3. Employer and Employee— workplace harassment—pretext—insufficient evidence

The trial court correctly granted summary judgment for defendants on plaintiff's Whistleblower action where plaintiff did not produce sufficient evidence that a change in plaintiff's work conditions and a "Below Good" performance evaluation were merely pretextual. Defendants presented legitimate, non-retaliatory reasons for the changes in plaintiff's working conditions and her performance evaluation; to raise a factual issue regarding pretext, plaintiff's evidence must go beyond a prima facie showing by pointing to specific, non-speculative facts which discredit defendant's non-retaliatory motive.

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4. Emotional Distress; Immunity— state employee—workplace harassment—sovereign immunity

The trial court correctly granted summary judgment for defendants Florence and Daughtry on plaintiff's emotional distress claims arising from her employment with the state Department of Correction where the trial court erroneously determined that the claims were barred by sovereign immunity, but the evidence of extreme and outrageous conduct was insufficient for intentional infliction of emotional distress and the evidence of foreseeability was insufficient for negligent infliction of emotional distress. Summary judgment should be affirmed on appeal if it can be sustained on any grounds.

Appeal by plaintiff from judgment entered 9 July 2001 by Judge Jay D. Hockenbury in Carteret County Superior Court. Heard in the Court of Appeals 4 June 2002.

Patterson, Harkavy & Lawrence, L.L.P., by Martha A. Geer; and Davis, Murrelle & Lyles, P.A., by Edward L. Murrelle, for plaintiff-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Thomas H. Moore, for defendants-appellees.

WALKER, Judge.

On 29 October 1999, plaintiff filed an amended complaint asserting a claim against defendants in their official capacities for wrongful workplace retaliation in violation of N.C. Gen. Stat. § 126-84, *et seq.* (the Whistleblower Act). Plaintiff also asserted claims against defendants Duncan Daughtry (Daughtry) and Anthony Florence (Florence) in their individual capacities for intentional infliction of emotional distress and negligent infliction of emotional distress. On 9 July 2001, the trial court entered summary judgment for defendants on all claims.

In her complaint, plaintiff alleged that in 1998, while employed as an office assistant at the Carteret Correctional Center in Newport (Carteret), she reported that her supervisor, Florence, had made "inappropriate, sexual comments, overtures, and gestures" towards her. She further alleged that, although the Equal Employment Opportunities/Title VII (EEO) section of the Department of Corrections (DOC) determined her report was "unfounded," defendants wrongfully retaliated against her by creating a "hostile" work

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environment. Specifically, plaintiff asserted that, after she made her report, defendants: (1) forced her to return "back to Florence's supervision," (2) required her to perform an "excessive amount of work equivalent for two people," and (3) gave her "below average and unsatisfactory job evaluations." As a result, plaintiff developed "headaches, chest pain, depression, fatigue, decreased motivation, and decreased energy" for which she needed medical treatment and was ultimately forced to resign her position.

In support of their motion for summary judgment, defendants provided affidavits from DOC Eastern Region Director Joseph Lofton (Lofton), former Programs Supervisor at Carteret Wallace Lunsford (Lunsford), Florence, and Daughtry. In Daughtry's affidavit, he stated that, as the Superintendent of Carteret, he became aware of "difficulties in communications" between plaintiff and Florence concerning "job assignments" in January of 1998. To alleviate the problem, Daughtry transferred plaintiff to the "direct supervision" of Lunsford. Nonetheless, plaintiff "continued to provide clerical support to . . . Florence and others in his department." According to Daughtry, he was not informed of plaintiff's allegations of sexual harassment until December of 1998. Following the EEO's determination that the allegations were unsubstantiated and after receiving instructions from Lofton, he returned plaintiff to Florence's direct supervision. At that time, another office assistant was on long-term sick leave and Lunsford was in the process of transferring to another correctional facility. Therefore, it became necessary to reassign the clerical duties normally handled by these two employees to "other staffers," including plaintiff. Daughtry further averred that plaintiff received a "Below Good" rating from Lunsford and Florence during her last year of employment. He attributed the rating to plaintiff's "problems with missing work, being tardy for work, . . . poor relations with co-workers," and an incident in which plaintiff failed to properly report that she had lost her set of security keys.

In his affidavit, Lofton averred that, in November of 1998, he received a request from Daughtry to investigate "morale problems" at Carteret. At the time, he perceived the problems to be "centered around a complaint made by . . . plaintiff concerning her interim appraisal" Consequently, Lofton sent two officials from the Eastern Region Office to Carteret to conduct an investigation, during which plaintiff alleged that Florence had sexually harassed her. In accordance with DOC policy, plaintiff's allegation was forwarded to the EEO. Lofton further stated that, after the investigation, he "was

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concerned of the finding . . . that the programs staff at Carteret were afraid to give directions to . . . plaintiff due to the perception of retaliation from her husband, Charles Wells, a correctional sergeant at Carteret." Following receipt of an EEO letter concluding that plaintiff's allegations of sexual harassment could not be substantiated, he ordered that plaintiff be moved back under Florence's direct supervision. His reasons for doing so were "to put [plaintiff] back where she belonged in the organizational chart, to dispel the staff concerns that [plaintiff] could move around at will in the institution whenever she voiced dissatisfaction at her supervisor, and to also alleviate [plaintiff's] concerns that she had been 'demoted . . .'" Finally, Lofton noted that, in May of 1999, he received a grievance from plaintiff regarding a "Below Good" performance evaluation for the period of 1 April 1998 to 31 March 1999. After reviewing the evaluation, he declined to act on plaintiff's grievance; nevertheless, he informed plaintiff she could appeal his decision to the Secretary of Correction.

In his affidavit, Florence denied having sexually harassed plaintiff. He further averred that in December of 1997, he became concerned about plaintiff's "repeated tardiness and her lack of attention to some specific job assignments" Although he attempted to voice his concerns directly to plaintiff, Florence found her response "made it clear that she did not think that my concerns . . . were something that I should have addressed with her." Soon thereafter, Daughtry transferred plaintiff to Lunsford's direct supervision. In the summer of 1998, Florence noted an improvement in plaintiff's job performance and, in an effort to "reenforce this behavior," he recommended that plaintiff be named "Employee of the Month" for July of 1998. However, in the succeeding months, plaintiff became "upset" with Lunsford's supervision and received "Below Good" ratings from Lunsford in her performance log for the months of August and September. When plaintiff was returned to his direct supervision, Florence issued a memorandum in which he re-distributed the clerical duties formerly performed by Lunsford and the office assistant who was on leave. In his opinion, plaintiff was "not assigned any duties outside of her job description." Once plaintiff expressed concern that she was "doing the workload of two people," he and Daughtry met with plaintiff and compared plaintiff's job description to that of the office assistant on leave. According to Florence, "[o]ur review showed that [plaintiff] was not being given any assignments outside of her job description and that she did not do most of the job tasks on [the absent office assistant's] job description."

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Finally, in his affidavit, Lunsford corroborated the statements of Daughtry and Florence that plaintiff was transferred to his direct supervision in order to "resolve communication problems" between Florence and plaintiff. He further averred that, while under his supervision, plaintiff "frequently complained to me about her work, specifically about the tasks she was assigned to do." Lunsford noted that plaintiff had a history of "either being tardy or not showing up for work and she never built up a substantial balance of sick or vacation time." Although he encouraged plaintiff to improve on these points, plaintiff was "resistant to constructive criticism on how to go about improving both her job performance and attendance problems."

Among the evidence plaintiff presented in response to defendants' summary judgment motion was her affidavit, in which she stated that, during an investigation in December of 1998, she "truthfully answered some questions regarding what [she] perceived to have been sexual harassment and a hostile work environment caused by . . . Florence." She further maintained that defendants' contention concerning the fact that she did not receive any additional job assignments following her report was "untrue." She then listed certain "new duties" which she asserted were previously assigned to the other office assistant that she "assume[d]" after she returned to Florence's direct supervision. Plaintiff also presented various performance evaluations. In a 1996 evaluation, plaintiff received an overall "Good" rating from her previous supervisor, Jerry Moore, who specifically noted that plaintiff "takes on her duties in a professional manner," "assists other staff very well," and "has demonstrated good work habits." Plaintiff contrasted this rating with a "Below Good" rating she received on her 1999 evaluation based on "Below Good" performances in "supervision," "planning and organization," and "communication" and "Unsatisfactory" performances in "safety and security" and "performance stability." Notwithstanding the overall "Below Good" rating, plaintiff averred that she "worked hard" and "did not have trouble with co-workers." Lastly, plaintiff provided an affidavit from a former co-worker, James Montanye, who stated that in 1999 Florence had complimented plaintiff's work in "computing gain time."

After reviewing the affidavits, pleadings and other materials submitted by the parties, the trial court determined that plaintiff's evidence "establish[ed] a *prima facie* case of retaliation," but that defendants' evidence "rebutted the Plaintiff's *prima facie* showing" by "establish[ing] that there were legitimate, nondiscriminatory rea-

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sons for all acts or omissions that the Plaintiff . . . alleged were retaliatory. . . .” The trial court then concluded that plaintiff “fail[ed] to establish any evidence of pretext on the part of the Defendants for their stated legitimate, nondiscriminatory reasons” In addition, the trial court determined that “all alleged wrongful acts or omissions by Defendants Duncan Daughtry and Anthony Florence occurred within the scope of their employment” and, as such, “the doctrine of sovereign immunity bars” plaintiff’s emotional distress actions.

I.

[1] We first address whether plaintiff’s retaliation claim comes within the provisions of the Whistleblower Act. Defendants contend that retaliation claims such as the one made by plaintiff must come before the State Personnel Commission pursuant to N.C. Gen. Stat. § 126-36(b). Therefore, defendants argue that summary judgment was appropriate as plaintiff had no remedy under the Whistleblower Act.

Under N.C. Gen. Stat. § 126-36(b):

[A]ny State employee or former State employee who has reason to believe that the employee has been subjected to any of the following shall have the right to appeal directly to the State Personnel Commission:

. . .

(2) Retaliation for opposition to harassment in the workplace based upon age, sex, race, color, national origin, religion, creed, or handicapping condition, whether the harassment is based upon the creation of a hostile work environment or upon a quid pro quo.

N.C. Gen. Stat. § 126-36(b) (2001).

On the other hand, the Whistleblower Act states in pertinent part:

It is the policy of this State that State employees shall be encouraged to report verbally or in writing to their supervisor, department head, or other appropriate authority, evidence of activity by a State agency or State employee constituting:

(1) A violation of State or federal law, rule or regulation;

. . .

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No State employee shall retaliate against another State employee because the employee, or a person acting on behalf of the employee reports . . . [a violation of the Whistleblower Act].

. . .

Any State employee injured by a violation of the [Whistleblower Act] may maintain an action in superior court for damages, an injunction, or other remedies provided

N.C. Gen. Stat. § 126-84 *et seq.*

Defendants maintain that because N.C. Gen. Stat. § 126-36(b) specifically addresses workplace harassment, the State Personnel Commission was the “exclusive forum” for plaintiff’s action. In response, plaintiff contends that since harassment in the workplace is a violation of “state and federal law,” her action under the Whistleblower Act is proper.

Based on our analysis of these two statutes, we do not interpret N.C. Gen. Stat. § 126-36(b) as precluding plaintiff’s Whistleblower action. Indeed, the statute merely provides plaintiff with “*the right to appeal*” her wrongful retaliation claim directly to the State Personnel Commission. N.C. Gen. Stat. § 126-36(b) (emphasis added). Such “right to appeal” does not otherwise bar an action which meets the requirements of the Whistleblower Act. Furthermore, when N.C. Gen. Stat. § 126-36(b) is read *in para materia* with the Whistleblower Act, the two statutes are not irreconcilable. See *Occaneechi Band of the Saponi Nation v. N.C. Comm’n of Indian Affairs*, 145 N.C. App. 649, 654, 551 S.E.2d 535, 539, *disc. rev. denied*, 354 N.C. 365, 556 S.E.2d 575 (2001) (“When multiple statutes address a single matter or subject, the statutes must be construed *in para materia*, ‘as together constituting one law,’ and harmonized to give effect to each statute whenever possible”). We conclude the two statutes create alternative means for an aggrieved party to seek relief. See *generally Swain v. Elfland*, 145 N.C. App. 383, 389, 550 S.E.2d 530, 535, *cert. denied*, 354 N.C. 228, 554 S.E.2d 832 (2001) (holding N.C. Gen. Stat. § 136-34.1(a)(7) and the Whistleblower Act provide “two avenues to redress violations of the Whistleblower statute”)¹. Accordingly, the trial court did not err in determining that plaintiff’s Whistleblower action was properly before the court.

1. The record does not indicate plaintiff filed a wrongful retaliation claim with the State Personnel Commission. Thus, unlike *Swain*, this case does not present an issue of claim preclusion.

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II.

We next consider whether a genuine issue of material fact exists regarding plaintiff's Whistleblower action. The law, as it pertains to this area, was first addressed by this Court in *Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 448 S.E.2d 280 (1994). Initially, the plaintiff must establish a *prima facie* case of retaliation, the elements of which are: (1) the plaintiff's engagement in a " 'protected activity,' " (2) an " 'adverse employment action' " occurring subsequent to the " 'protected activity,' " and (3) the plaintiff's engagement in the " 'protected activity' " was a " 'substantial or motivating factor' " in the " 'adverse employment action.' " *Id.* at 584, 448 S.E.2d at 282 (*quoting McCauley v. Greensboro City Bd. of Educ.*, 714 F. Supp. 146, 151 (M.D.N.C. 1987)); *see also Hanton v. Gilbert*, 126 N.C. App. 561, 571, 486 S.E.2d 432, 439, *disc. rev. denied*, 347 N.C. 266, 493 S.E.2d 454 (1997). Once a *prima facie* case is made, the defendant must then " 'articulate a legitimate, non-discriminatory reason for the adverse [employment] action.' " *Kennedy*, 115 N.C. App. at 585, 448 S.E.2d at 282 (*quoting Melchi v. Burns Int'l Sec. Servs. Inc.*, 597 F.Supp. 575, 582 (E.D. Mich. 1984)). "Finally, if the defendant . . . meets its burden [of production], the plaintiff must then come forward with evidence to show 'that the legitimate reason was a mere pretext for the retaliatory action.' " *Id.* "[T]hus, 'a plaintiff retains the ultimate burden of proving that the [adverse employment action] would not have occurred had there been no protected activity' engaged in by the plaintiff." *Id.*

As with other summary judgment determinations, the trial court must view the evidence in the light most favorable to the non-movant. *Id.* at 583, 448 S.E.2d at 281. All reasonable inferences are drawn in the non-movant's favor. *Id.* While a trial court's findings and conclusions in support of a summary judgment may be helpful, "they are to be disregarded on appeal." *See Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 261, 400 S.E.2d 435, 440 (1991); and *Mosley v. National Finance Co.*, 36 N.C. App. 109, 111, 243 S.E.2d 145, 147, *disc. rev. denied*, 295 N.C. 467, 246 S.E.2d 9 (1978).

Plaintiff presents two alternative grounds as to why the trial court's grant of summary judgment on her Whistleblower action was improper: (1) the trial court failed to apply the appropriate analytical model to her action, and (2) even if the trial court applied the appropriate model, she presented sufficient evidence to withstand summary judgment.

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A. Proper Analytical Model

[2] Plaintiff first argues that rather than utilizing the pretext model of analysis articulated in *Kennedy*, the trial court should have used a mixed-motive model resembling the one set forth by the United States Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268 (1989). We disagree.

In *Price Waterhouse*, the Court recognized two distinct means for analyzing actions brought under Title VII of the 1964 Civil Rights Act—the pretext model and the mixed-motive model. The traditional pretext model follows the analysis developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668 (1973) and its progeny, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 67 L. Ed. 2d 207 (1981) and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 125 L. Ed. 2d 407 (1993), and was applied to Whistleblower actions by this Court in *Kennedy*. However, in *Price Waterhouse*, the Court recognized the shortcomings of using the pretext model in cases where the evidence clearly shows that the adverse employment decision was the result of a “mixture of legitimate and illegitimate motives.” *Price Waterhouse*, 490 U.S. at 232, 104 L. Ed. 2d 276. Thus, in cases in which the plaintiff’s *prima facie* case presents “*direct evidence* that decisionmakers placed substantial negative reliance on an illegitimate criterion,” the burden of persuasion shifts to the defendant, who must then demonstrate that it would have made the same decision even absent the illegitimate criterion. *Id.* at 258, 277, 104 L. Ed. 2d at 293, 305 (emphasis added). The evidence required to trigger use of the mixed-motive model is “evidence of conduct or statements that both reflect directly the alleged [illegitimate criterion] and that bear directly on the contested employment decision.” *Fuller v. Phipps*, 67 F3d 1137, 1142 (4th Cir. 1995).

As plaintiff points out, this Court recently applied the mixed-motive/pretext distinction to an action brought under N.C. Gen. Stat. § 143-422.1 (the Equal Employment Practices Act). See *Brewer v. Cabarrus Plastics*, 146 N.C. App. 82, 551 S.E.2d 902, *appeal filed*, (No. 560A01, 26 September 2001). In *Brewer*, the plaintiff alleged that the defendant had discriminated against him on the basis of race and had wrongfully retaliated for filing a complaint of racial discrimination. Our Court determined that the mixed-motive/pretext distinction applied, but concluded that because the plaintiff had presented no direct evidence of discrimination, the case was properly categorized as a pretext model case. *Id.* at 86, 551 S.E.2d at 905.

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Nonetheless, even if we were to assume the same distinction also applies to a Whistleblower action, plaintiff here has failed to proffer sufficient direct evidence of retaliation on the part of defendants to warrant analysis using the mixed-motive model. The substance of plaintiff's allegation is that defendants wrongfully responded to her report of sexual harassment by: (1) returning her to Florence's supervision, (2) requiring her to perform additional work assignments, and (3) giving her a negative performance rating. As "direct evidence" in support of her allegation, plaintiff cites Lofton's affidavit in which he states that he returned plaintiff to Florence's supervision "to dispel the staff concerns that [plaintiff] could move around at will in the institution whenever she voiced dissatisfaction at her supervisor." Plaintiff also cites a notation on her 1999 performance evaluation indicating that she "demonstrated difficulty in communicating with her supervisor" and that she had "poor relations with co-workers."

We are not persuaded that plaintiff has presented the direct evidence required to treat her Whistleblower action as a mixed-motive case. By way of contrast, the plaintiff in *Price Waterhouse* cited specific comments from the defendant's partners to support her allegation of gender discrimination. This evidence included a partner's suggestion that, in order to advance within the company, she should " 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.' " *Price Waterhouse*, 490 U.S. at 235, 104 L. Ed. 2d at 278. Similarly, in *Kubicko v. Ogden Logistics Services*, 181 F.3d 544 (4th Cir. 1999), the plaintiff alleged that he was terminated in retaliation for opposing a supervisor's sexual harassment of a female co-worker. To substantiate his allegation, the plaintiff provided specific statements and actions of his supervisor which clearly reflected a retaliatory attitude. The evidence included the supervisor's statement that the reason for the plaintiff's termination was because the plaintiff had "initiated" the co-worker's complaints of sexual harassment. *Kubicko*, 181 F.3d at 553.

Unlike the evidence in *Price Waterhouse* and *Kubicko*, plaintiff's evidence here does not establish a clear connection between her sexual harassment complaint and the decision to return her to Florence's supervision or the "Below Good" rating on her performance evaluation. Although plaintiff argues such a connection can be inferred, "[s]imply because a . . . [wrongful] reason might be inferred from a *prima facie* case does not mean that a mixed motive case exists." *Schleinger v. Des Moines Water Works*, 925 F.2d 1100, 1101

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(8th Cir. 1991). As is required in mixed-motive model cases, plaintiff did not present any “clear signs” that the “alleged adverse employment action” was directly related to her sexual harassment complaint. Hence, we conclude the trial court properly addressed her action as a pretext case. *See Price Waterhouse*, 490 U.S. at 235, 104 L. Ed. 2d at 278.

B. Sufficiency of the Evidence

[3] Plaintiff also maintains that she provided sufficient evidence to raise an issue of fact concerning whether defendants’ stated reasons for the changes in her working conditions and her “Below Good” performance evaluation were merely pretexts for their retaliatory motives. This Court has previously held that, in a Whistleblower action, “once a defendant, moving for summary judgment, presents evidence that the adverse employment action is based on a legitimate non-retaliatory motive, the burden [of production] shifts to the plaintiff to present evidence, raising a genuine issue of fact, that his [engagement in a protected activity] . . . [was] a *substantial causative factor* in the adverse employment action, or provide an excuse for not doing so.” *Aune v. University of North Carolina*, 120 N.C. App. 430, 434-35, 462 S.E.2d 678, 682 (1995), *disc. rev. denied*, 342 N.C. 893, 467 S.E.2d 901 (1996) (citations omitted) (emphasis added). To raise a factual issue regarding pretext, the plaintiff’s evidence must go beyond that which was necessary to make a *prima facie* showing by pointing to specific, non-speculative facts which discredit the defendant’s non-retaliatory motive. *See Kennedy*, 115 N.C. App. at 589, 448 S.E.2d at 284.

Here, assuming *arguendo* that plaintiff has established a *prima facie* case, defendants presented legitimate, non-retaliatory reasons for the changes in plaintiff’s working conditions and her “Below Good” performance evaluation. Defendants noted in general that plaintiff remained in the same job classification, earned the same salary, and accrued the same benefits. In response to her particular allegations, defendants asserted that the reasons for plaintiff’s return to Florence’s direct supervision were: (1) because Lunsford had left Carteret, (2) to place her “where she belonged within the organizational chart,” and (3) to address staff concerns that plaintiff could change supervisors whenever she voiced her “dissatisfaction.” With respect to any additional work duties assigned to plaintiff, defendants stated that such assignment was necessary to cover the clerical work previously performed by Lunsford and by an office assistant who was on leave. Defendants further responded that, in any event, plaintiff

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was not required to perform any duties “outside of her job description” and was never required to work overtime. Finally, according to defendants, plaintiff received an overall “Below Good” rating on her performance evaluation due to her tardiness and absenteeism, poor relations with co-workers, and failure to properly report a lost set of security keys. Defendants also point out that plaintiff had received “Below Good” ratings from Lunsford on interim evaluations prior to her sexual harassment complaint.

As a response to defendants’ reasons for returning her to Florence’s supervision, plaintiff asserts that “[d]efendants have offered no serious explanation for insisting that [plaintiff] report to the person who harassed her,” and, therefore, “a jury could consider punitive a requirement that [plaintiff] again work with . . . Florence after [Daughtry] had previously decided separation was necessary.” In support of this position, plaintiff cites *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989), *rev’d in part on other grounds*, 900 F.2d 27 (4th Cir. 1990) (per curiam). However, in *Paroline*, the Court was not faced with the issue of whether the plaintiff’s evidence was sufficient to raise a factual question of pretext. Rather, the Court addressed whether an employee’s established acts of sexual harassment could be imputed to an employer. *Id.* at 106-07. In any event, plaintiff has failed to present any evidence which would indicate that defendants’ stated reasons for returning her to Florence’s supervision were not in accordance with any DOC personnel policies or were not otherwise legitimate. She merely renews her allegation that defendants “had no serious explanation.” See *Kennedy*, 115 N.C. App. at 585, 448 S.E.2d at 282 (“An articulated reason is not ‘legitimate’ . . . unless it has ‘a rational connection with the business goal of securing a competent and trustworthy work force.’”) (quoting *Harris v. Marsh*, 679 F.Supp. 1204, 1285 (E.D.N.C. 1987), *aff’d in part, rev’d in part on other grounds by Blue v. U.S. Dept. of Army*, 914 F.2d 525 (4th Cir. 1990), *cert. denied*, 499 U.S. 959, 113 L. Ed. 2d 645 (1991)).

Plaintiff further contends that, with respect to the additional work duties, her evidence “quantified that the additional duties required as much as an additional 33 hours per week,” and that “defendants did not include the job descriptions in the record” to support their reasons for demanding she “assume the duties of two people.” However, even if we accept plaintiff’s calculations, such evidence does not discredit defendants’ assertion that the additional job assignments were necessary to cover the absence of other employees or that plaintiff was never required to perform work outside of her job description or work overtime.

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Lastly, regarding her "Below Good" performance evaluation, plaintiff maintains that the "telling temporal sequence" between her sexual harassment complaint and her negative evaluation, by itself, is "sufficient [for] a jury to find pretext." As authority, plaintiff cites this Court's first holding in *Brewer v. Cabarrus Plastics*, 130 N.C. App. 681, 504 S.E.2d 580 (1998), *disc. rev. denied*, 350 N.C. 91, 527 S.E.2d 662 (1999) and the decisions in *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759 (2nd Cir. 1998) and *Shirley v. Chrysler First, Inc.*, 970 F.2d 39 (5th Cir. 1992). However, *Brewer* and *Shirley* concerned whether the passage of a certain amount of time precluded as a matter of law the plaintiff's establishment of a *prima facie* case and not whether the plaintiff had established pretext. *Brewer*, 130 N.C. App. at 691, 504 S.E.2d at 586-87 (holding that the passage of fifteen months between the filing of an EEOC charge and the plaintiff's termination did not negate a causal connection between the two events), and *Shirley*, 970 F.2d at 43-44 (holding that the passage of fourteen months between the plaintiff's initial EEOC charge and the defendant's alleged retaliatory conduct was not "legally conclusive proof" against retaliation). Additionally, the holding in *Quinn* is distinguishable from this case in view of the fact that in *Quinn* "[n]early all of the record evidence supporting the [defendant's] asserted non-retaliatory reason . . . was generated by two of [the plaintiff's] alleged harassers . . . and followed her initial [complaint] . . ." *Quinn*, 159 F.3d at 770. In contrast, the record here shows that plaintiff received "Below Good" ratings from Lunsford on her interim appraisals prior to her sexual harassment complaint. Plaintiff also has not presented any facts to discredit defendants' assertion that her overall "Below Good" performance evaluation was due to her tardiness and absenteeism, poor relations with co-workers, and loss of a set of security keys. Therefore, we conclude plaintiff failed to produce sufficient evidence to raise a factual question concerning whether defendants' legitimate, non-retaliatory reasons for the change in her work conditions and her "Below Good" performance evaluation were merely pretextual. Accordingly, the trial court properly granted summary judgment to defendants on plaintiff's Whistleblower action.

III.

[4] Lastly, we address whether the trial court properly granted summary judgment in favor of Florence and Daughtry on plaintiff's emotional distress claims. Plaintiff contends the trial court erred in determining that these claims were barred based on the doctrine of sovereign immunity. Florence and Daughtry maintain that, because

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they were sued only in their "official capacities," summary judgment was proper.

In *Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997), our Supreme Court outlined the guidelines for determining whether a claim for relief may be made against an individual who is employed by the State. The first determination to be made is whether the complaint seeks recovery from a named defendant in his official or individual capacity or both. If the court determines that the defendant is being sued in his individual capacity, it must next determine whether the individual is a public official or public employee. This determination is important for negligence claims because, "[p]ublic officials cannot be held individually liable for damages caused by mere negligence in the performance of their governmental or discretionary duties; public employees can." *Meyer*, 347 N.C. at 112, 489 S.E.2d at 888. However, if the plaintiff alleges an intentional tort claim, a determination is unnecessary since, in such cases, neither a public official nor a public employee is immunized from suit in his individual capacity. See *Hawkins v. State*, 117 N.C. App. 615, 630, 453 S.E.2d 233, 242, *disc. rev. denied*, 342 N.C. 188, 463 S.E.2d 79 (1995).

"The crucial question for determining whether a defendant is sued in an individual or official capacity is the nature of the relief sought, not the nature of the act or omission alleged. If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant is named in an official capacity. If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. If the former, it's an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities."

Meyer, 347 N.C. at 110, 489 S.E.2d at 887 (quoting Anita R. Brown-Graham and Jeffrey S. Koeze, *Immunity from Personal Liability under State Law for Public Officials and Employees: An Update*, Loc. Gov't L. Bull. 67 (Inst. of Gov't, Univ. of N.C. at Chapel Hill), Apr. 1995, at 7). "Whether the allegations relate to actions outside the scope of [the] defendant's official duties is not relevant in determining whether the defendant is being sued in his or her official or individual capacity." *Id.* at 111, 489 S.E.2d at 888.

Here, our review of the record reveals that, in the caption of her complaint, plaintiff designated that Florence and Daughtry were

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being sued in both their official and individual capacities. Additionally, in the prayer for relief for her emotional distress claims, plaintiff seeks monetary damages directly from Florence and Daughtry and not from the other named defendants. Thus, we conclude Florence and Daughtry were sued in their individual capacities with respect to these claims. Moreover, because intentional infliction of emotional distress is an intentional tort, Florence and Daughtry were not entitled to immunity as to this claim.

In accordance with the holding in *Meyer*, we next consider whether Florence and Daughtry are public officials and therefore are immune from plaintiff's claim for negligent infliction of emotional distress. As our Supreme Court has noted:

Our courts have recognized several basic distinctions between a public official and a public employee, including: (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties.

Isenhour v. Hutto, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999) (citations omitted). " 'Discretionary acts are those requiring personal deliberation, decision and judgment' " while "[m]inisterial duties . . . are absolute and involve 'merely [the] execution of a specific duty arising from fixed and designated facts.' " *Id.* (quoting *Meyer*, 347 N.C. at 113-14, 489 S.E.2d at 889).

Aside from their respective job titles, the record does not detail the job responsibilities of Florence and Daughtry. Also, neither defendant has cited authority which specifically categorizes their position as a public official. Hence, we are unable to conclude that either Florence or Daughtry is a public official entitled to immunity on plaintiff's claim for negligent infliction of emotional distress. Nevertheless, the trial court's grant of summary judgment as to plaintiff's emotional distress claims can be sustained on other grounds. *See Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) ("If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered").

Regarding plaintiff's intentional infliction of emotional distress claim, plaintiff's evidence fails to demonstrate that Florence's and

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Daughtry's conduct was " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.' " *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 493, 340 S.E.2d 116, 123, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 140 (1986) (*quoting* Restatement (Second) of Torts § 46, Comment d (1965)). Indeed, Lofton ordered that plaintiff be returned to Florence's supervision and the "Below Good" evaluation was based in part on observations made by Lunsford. Even assuming Florence and Daughtry did not always agree with plaintiff, their decisions concerning plaintiff's working conditions did not go "beyond all possible bounds of decency." *See e.g. Stamper v. Charlotte-Mecklenburg Bd. of Ed.*, 143 N.C. App. 172, 174-75, 544 S.E.2d 818, 820 (2001) (holding that conduct of a principal and other officials in subjecting teacher to more than 15 classroom observations and conference meetings, videotaping her while she was teaching a lesson, and transferring her to a school which was a long distance away from her children's school was not sufficiently "extreme and outrageous" conduct to support a claim for intentional infliction of emotional distress). Therefore, we conclude, as a matter of law, that their alleged actions do not rise to a level of "extreme and outrageous" conduct necessary to support an action for intentional infliction of emotional distress. *See Hogan*, 79 N.C. App. at 490, 340 S.E.2d at 121 ("It is a question of law for the court to determine, from the materials before it, whether the conduct complained of may reasonably be found to be sufficiently outrageous as to permit recovery").

With respect to plaintiff's claim for negligent infliction of emotional distress, such an action has three elements: "(1) defendant engaged in negligent conduct; (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress and (3) defendant's conduct, in fact, caused severe emotional distress." *Robblee v. Budd Services, Inc.*, 136 N.C. App. 793, 795, 525 S.E.2d 847, 849, *disc. rev. denied*, 352 N.C. 676, 545 S.E.2d 228 (2000). Based on our review of the record, we conclude that plaintiff failed to forecast sufficient evidence that it was reasonably foreseeable that Florence's and Daughtry's decision to change her working conditions would cause her severe emotional distress. Therefore, summary judgment on plaintiff's negligent infliction of emotional distress claim was also appropriate.

In sum, we hold the trial court properly entered summary judgment for all defendants on plaintiff's Whistleblower claim and we

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further conclude that Florence and Daughtry were entitled to summary judgment on plaintiff's emotional distress claims. Accordingly, the decision of the trial court is

Affirmed.

Judges McCULLOUGH and BRYANT concur.

WILLIE B. JOHNSON, EMPLOYEE, PLAINTIFF-APPELLEE V. SOUTHERN TIRE SALES AND SERVICE, EMPLOYER, CASUALTY RECIPROCAL EXCHANGE, CARRIER, DEFENDANT-APPELLANTS

No. COA01-917

(Filed 20 August 2002)

1. Workers' Compensation— refusal of suitable employment—sufficiency of evidence

The Industrial Commission did not err in a workers' compensation action by concluding that plaintiff had cooperated with vocational rehabilitation where defendants contended that plaintiff refused suitable employment but produced no evidence of any actual refusal. The only evidence defendants offered to support plaintiff's ability to obtain employment was the opinion of a vocational rehabilitation specialist, but the Industrial Commission specifically found that it gave more weight to a doctor's opinion about plaintiff's limitations.

2. Appeal and Error— assignment of error—lack of supporting authority

An assignment of error without supporting authority was deemed abandoned.

3. Workers' Compensation— temporary total disability—evidence of continued disability

The Industrial Commission did not err in a workers' compensation case by awarding plaintiff temporary total disability after maximum medical improvement where there was competent evidence to support a finding that plaintiff remained disabled.

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4. Workers' Compensation— objection at hearing—no ruling

There was no prejudicial error in a workers' compensation proceeding where the Industrial Commission did not rule specifically on an objection. However, it is the better practice for the Commission to always formally enter its rulings on objections.

5. Workers' Compensation— medical expenses—time limits

The Industrial Commission's conclusion that defendants should pay all of plaintiff's related medical expenses, as required by N.C.G.S. § 97-25.1, was not overly broad in that it did not set a time limit. The employer had not made its last medical compensation payment and the statute of limitations had not begun to run. Furthermore, the parameters of N.C.G.S. § 97-2(19) were inherent in the Industrial Commission's award and defendants were not required to pay more than that statute provides.

Judge TYSON dissenting.

Appeal by defendants from opinion and award entered 6 February 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 May 2002.

Schiller Law Firm, L.L.P., by Marvin Schiller and David G. Schiller, for plaintiff-appellee.

Young Moore and Henderson P.A., by Joe E. Austin, Jr. and Dawn Dillon Raynor, for defendant-appellants.

McGEE, Judge.

Willie B. Johnson (plaintiff) sustained a compensable injury to his back while employed at Southern Tire Sales and Service on 24 October 1996. Plaintiff was using a long iron pry bar while replacing a lower ball joint when the pry bar slipped. Defendants issued a form 63 payment of compensation and did not deny the claim within the 120-day time limitation provided in N.C. Gen. Stat. § 97-18 (1999). Plaintiff continued to work without seeking medical treatment until 27 November 1996, when plaintiff saw Dr. Bernard Bennett (Dr. Bennett).

Dr. Michael Gwinn (Dr. Gwinn) saw plaintiff on 12 March 1997. Dr. Gwinn stated plaintiff suffered from chronic mechanical back pain related to lumbar degenerative disk disease. After a meeting with plaintiff on 1 May 1998, Dr. Gwinn testified the pain plaintiff reported

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was greater than the objective tests would indicate. Dr. Gwinn discontinued his treatment of plaintiff on 1 May 1998, stating he could no longer treat plaintiff due to plaintiff's attorney's involvement. Plaintiff returned to Dr. Bennett.

Plaintiff began treatment with Dr. Charles A. Cook (Dr. Cook) on 13 July 1998. Dr. Cook testified that on this date plaintiff could not perform any physical activity that would require standing or sitting for periods of more than twenty minutes, bending or squatting, or lifting more than five pounds. Dr. Cook continued to be plaintiff's treating physician through the time of the hearing.

Plaintiff saw Dr. William Lestini (Dr. Lestini), a spinal surgeon, on 6 October 1998. Dr. Lestini made a presumptive diagnosis of symptomatic painful disc disease.

Plaintiff began meeting with Ronald Alford (Alford), a certified vocational rehabilitation specialist, in August 1997. Alford testified plaintiff repeatedly insisted he could not return to work, not only to Alford, but also to potential employers with whom plaintiff met. Alford secured approximately twelve job leads for plaintiff, but plaintiff was not offered a job by any of these employers.

A deputy commissioner entered an opinion and award in favor of defendants on 27 April 2000. The Industrial Commission reversed the deputy commissioner's decision in an opinion and award entered on 6 February 2001. The Industrial Commission awarded plaintiff ongoing total disability, all medical expenses incurred by plaintiff as a result of the 24 October 1996 injury, and approved Dr. Cook as plaintiff's treating physician. Defendants appeal from this opinion and award.

I.

[1] Defendants first argue the Industrial Commission erred in concluding that plaintiff cooperated with vocational rehabilitation and is entitled to ongoing total disability. Defendants contend the Industrial Commission did not consider all of the pertinent and relevant evidence. We disagree.

On an appeal from an opinion and award from the Industrial Commission, the standard of review for this Court "is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v.*

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Foster Forbes Glass Div., 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). "The facts found by the Commission are conclusive upon appeal to this Court when they are supported by competent evidence, even when there is evidence to support contrary findings." *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999). Furthermore, the " 'findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence.' " *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)).

The Industrial Commission made several relevant findings of fact:

14. Plaintiff has made a reasonable effort to locate suitable employment on his own and through leads provided to him by Mr. Alford since he was first medically removed from work by Dr. Adomonis on 27 January 1997.

...

18. Because no job was ever offered to plaintiff, it cannot be found that he unjustifiably refused suitable employment.

...

20. Dr. Gwinn's opinion that plaintiff had "likely" reached maximum medical improvement is not given weight. This is so because it is clear from the evidence that plaintiff continues to experience debilitating pain as the result of his 24 October 1996 injury by accident.

21. The Full Commission gives greater weight to the testimony and opinions of Dr. Cook as opposed to testimony and opinions of Dr. Gwinn and Mr. Alford.

After a careful review of the record, we find these findings of fact are supported by competent evidence in the record. Defendants point this Court to no specific finding of fact that is without supporting evidence. Defendants contend plaintiff refused suitable employment, but they produce no evidence of any actual refusal. Defendants merely argue the Industrial Commission *could have* reached such a conclusion based on the rule of law that capacity to earn wages can be based on an employee's ability to be hired if the employee had diligently sought work. However, the only evidence defendants offer to support plaintiff's ability to diligently seek and obtain employment is

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the “opinion” of Alford. The Industrial Commission specifically found that it gave less weight to the opinions of Alford and Dr. Gwinn, as opposed to Dr. Cook’s opinion. Defendants merely want this Court to weigh the opinions and testimony of the witnesses in a manner which benefits defendants. On an appeal from the Industrial Commission, this Court is unable to weigh evidence.

“Before making findings of fact, the Industrial Commission must consider *all* of the evidence. The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it.” *Weaver v. American National Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996) (emphasis in original). We stress the Industrial Commission

“is the sole judge of the credibility of the witnesses and the weight to be given their testimony.” Thus, the Commission may assign more weight and credibility to certain testimony than other. Moreover, if the evidence before the Commission is capable of supporting two contrary findings, the determination of the Commission is conclusive on appeal.

Dolbow v. Holland Industrial, 64 N.C. App. 695, 697, 308 S.E.2d 335, 336 (1983), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 651 (1984) (quoting *Anderson v. Lincoln Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). This assignment of error is without merit.

II.

[2] Defendants next argue the Industrial Commission erred in placing any weight on Dr. Cook’s opinion and in designating Dr. Cook as plaintiff’s treating physician. However, defendants have failed to point to any citations of authority to support their argument. Our appellate rules require that arguments of appellants “contain citations of the authorities upon which the appellant relies.” N.C.R. App. P. 28 (b)(5). Defendants have failed to cite any supporting authority in this argument; therefore, we deem this assignment of error abandoned. See *State v. Thompson*, 110 N.C. App. 217, 222, 429 S.E.2d 590, 592 (1993).

III.

[3] Defendants next argue the Industrial Commission erred by awarding plaintiff temporary total disability benefits after maximum medical improvement and in spite of competent evidence that plaintiff is no longer disabled.

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As discussed above in Section I, there is competent evidence in the record to support the Industrial Commission's finding that plaintiff is disabled and unable to find suitable employment.

Defendants further contend the Industrial Commission erred in finding that "Dr. Gwinn's opinion that plaintiff had 'likely' reached maximum medical improvement is not given weight. This is so because it is clear from the evidence that plaintiff continues to experience debilitating pain as a result of his 24 October 1996 injury by accident." Defendants contend both Dr. Gwinn and Dr. Cook determined plaintiff had reached maximum medical improvement, and, as a result, the Industrial Commission could not award temporary disability as a matter of law. However, this Court has held it is not an error as a matter of law to award temporary total disability after an employee reaches maximum medical improvement. *Russos v. Wheaton Indus.*, 145 N.C. App. 164, 167, 551 S.E.2d 456, 459 (2001), *disc. review denied*, 355 N.C. 214, 560 S.E.2d 135 (2002). Once a plaintiff establishes a disability, "a presumption of disability attaches in favor of the employee." *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997). A finding of maximum medical improvement is not sufficient to overcome the presumption of disability.

A finding of maximum medical improvement is not the equivalent of a finding that the employee is able to earn the same wage earned prior to injury and does not satisfy the defendant's burden

After a finding of maximum medical improvement, the burden remains with the employer to produce sufficient evidence to rebut the continuing presumption of disability; the burden does not shift to the employee.

Brown v. S & N Communications, Inc., 124 N.C. App. 320, 330-31, 477 S.E.2d 197, 203 (1996). In the case before us, the Industrial Commission found plaintiff remained disabled, and there is competent evidence to support such a finding. Defendants' argument concerning the Industrial Commission's ability to award temporary total disability is misplaced. We overrule this assignment of error.

IV.

[4] Defendants next argue the Industrial Commission erred in failing to rule upon a specific objection and ordering defendants to pay all medical expenses incurred by plaintiff.

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Defendants cite *Ballenger v. Burris Industries*, 66 N.C. App. 556, 562, 311 S.E.2d 881, 885 (1984), for the rule of law that “the hearing commissioner . . . must formally enter his or her ruling into the record before making the award.” However, defendants point this Court to no showing of prejudice to defendants as a result of the Industrial Commission’s omission. While we stress the better practice is for the Industrial Commission to always formally enter its rulings on a party’s objection, we determine the Industrial Commission’s failure to rule specifically on the objection in the case before us did not prejudice defendants.

[5] Additionally, defendants argue the Industrial Commission’s conclusion that defendants were obligated to pay “for all related medical expenses incurred” is overly broad because it does not set a time limit, and the Industrial Commission did not limit the award to the precise definition articulated in N.C. Gen. Stat. § 97-2(19).

N.C. Gen. Stat. § 97-25.1 (1999) sets a two-year statute of limitation after the employer’s last payment. In the case before us, the employer has not made its last medical compensation payment; therefore, the statute of limitations has not begun to run. Furthermore, the Industrial Commission required defendants to pay medical expenses, and cited N.C.G.S. § 97-25. Inherent in the Industrial Commission’s award granted pursuant to N.C.G.S. § 97-25 is that the compensation will incorporate the parameters of N.C. Gen. Stat. § 97-2(19) (1999). Defendants were not required in the award to pay more than N.C. Gen. Stat. § 97-2(19) provides. We dismiss this assignment of error.

We affirm the award of the Industrial Commission.

Affirmed.

Chief Judge EAGLES concurs.

Judge TYSON dissents with a separate opinion.

TYSON, Judge, dissenting.

The Industrial Commission (“Commission”) applied the incorrect legal standard and failed to consider the totality of the evidence. The record does not contain competent evidence to support the Commission’s finding and conclusion that plaintiff cooperated with the rehabilitation efforts of defendants and did not constructively

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refuse suitable employment. *Moses v. Bartholomew*, 238 N.C. 714, 718, 78 S.E.2d 923, 926 (1953) (This Court “merely determines from the proceedings had before the commission whether there was sufficient competent evidence before the commission to support the findings of fact of the full commission.”) I respectfully dissent.

I. Facts

Defendants filed a Form 24, Application to Terminate or Suspend Payment of Compensation, seeking to suspend compensation to plaintiff on the ground that plaintiff was not cooperating with efforts at rehabilitation. The Special Deputy Commissioner was unable to make a determination on the Form 24 from the documentation provided by both parties. Defendants then filed a Form 33, Request for Hearing, to determine whether plaintiff had failed to cooperate with efforts at rehabilitation. Plaintiff filed a Form 33, Request for Hearing, and defendants filed a Form 33R, Response to Request for Hearing, to determine whether plaintiff was totally and permanently disabled. The Deputy Commissioner granted defendants’ request to suspend payment of compensation to plaintiff pursuant to N.C.G.S. § 97-25. The Commission reversed, with one commissioner dissenting, and awarded plaintiff temporary total disability.

II. Burden of Proof

A claimant who asserts entitlement to compensation under N.C.G.S. § 97-29 has the burden of proving that, as a result of the injury arising out of and in the course of employment, he is *totally* unable to “earn wages which . . . [he] was receiving at the time [of injury] in the same or any other employment.” *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994) (quoting *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 730, 403 S.E.2d 548, 550, *disc. review denied*, 329 N.C. 505, 407 S.E.2d 553 (1991)) (emphasis added). Defendants admitted liability and compensability by failing to accept or deny the claim within the statutory period after filing a Form 63. *See Sims v. Charmes/Arby’s Roast Beef*, 142 N.C. App. 154, 159, 542 S.E.2d 277, 281 (2001).

Once a plaintiff has established a compensable injury, “there is a presumption that disability lasts until the employee returns to work and likewise a presumption that disability ends when the employee returns to work at wages equal to those he was receiving at the time his injury occurred.” *Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971) (citing *Tucker v. Lowdermilk*, 233 N.C. 185, 63 S.E.2d 109 (1951)).

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Once disability is established, “the employer has the burden of producing evidence to rebut the claimant’s evidence.” *Burwell*, 114 N.C. App. at 73, 441 S.E.2d at 149. The employer must “‘come forward with evidence to show not only that suitable jobs are available, *but also that the plaintiff is capable of getting one*, taking into account both physical and vocational limitations.’” *Id.* (quoting *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990) (emphasis in *Burwell*)). “‘There is a presumption that [the employee] will eventually recover and return to work.’” *Effingham v. Kroger Co.*, — N.C. App. —, —, 561 S.E.2d 287, 294 (2002) (quoting Leonard T. Jernigan, Jr., *North Carolina Workers’ Compensation Law and Practice*, § 12-1 at 89 (3d ed.1999)). “[T]he employee must make reasonable efforts to go back to work or obtain other employment.” *Id.*

“A ‘suitable’ job is one the claimant is capable of performing considering his age, education, physical limitations, vocational skills, and experience.” *Burwell*, 114 N.C. App. at 73, 441 S.E.2d at 149 (citing *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 201 (4th Cir. 1984)). A plaintiff is “‘capable of getting’ a job if ‘there exists a reasonable likelihood . . . that he would be hired if he diligently sought the job.’ . . . If the employer produces evidence that there are suitable jobs available which the claimant is capable of getting, the claimant has the burden of producing evidence that either contests the availability of other jobs or his suitability for those jobs, or establishes that he has unsuccessfully sought the employment opportunities located by his employer.” *Id.* at 73-74, 441 S.E.2d at 149 (quoting *Tyndall*, 102 N.C. App. at 732, 403 S.E.2d at 551).

In this case, defendants presented substantial competent evidence that several suitable jobs were available within plaintiff’s “locality,” for which plaintiff was qualified and capable to perform. Ronald Alford, a certified rehabilitation counselor and expert in the field of vocational rehabilitation, testified that based on the medical restrictions assigned by Dr. Gwinn, plaintiff’s physical limitations, and plaintiff’s vocational background, there are full-time and part-time jobs available in packaging, assembly, benchwork, and security occupations that plaintiff is capable of performing which would pay plaintiff anywhere from \$5.15 to \$10.65 per hour. Mr. Alford identified approximately twelve jobs that were available, including Capital Vacuum, Firetrol, Burns Security, John West Auto Service, Manpower, Powertemp, Watchdog Alarm, Clark Paving, and Johnston County Industries. Mr. Alford testified that plaintiff either: (1) had failed to

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contact the employer, (2) told the employer he did not think that he could work, or (3) had informed the employer that he was in so much pain. Upon this showing, the burden of proof shifted to plaintiff to produce evidence that “either contests the availability of other jobs or his suitability for those jobs, or establishes that he has unsuccessfully sought the employment opportunities located by his employer.” *Id.*

During his testimony, plaintiff was unable to identify which employers he actually applied with, stating that “I contact who Ron [Alford] asks me to contact.” Plaintiff also testified that he failed to contact the Employment Security Commission, Manpower, or Power Temp Services as recommended by Mr. Alford. Additionally, plaintiff testified before the Deputy Commissioner that he failed to keep an appointment with Johnston County Industries because he could not drive that far. However, plaintiff also testified in an affidavit that he would not attend the Johnston County Industries appointment “because I was fearful of jeopardizing my award for social security disability.”

Dr. Gwinn, a board certified physical medicine rehabilitation specialist and trained to assess disabilities and determine work restrictions, testified that in his opinion plaintiff was employable within light to medium duty work with lifting restrictions of fifteen to twenty pounds, with avoidance of frequent bending and twisting, and with the ability to make postural changes as needed. Similarly, Dr. Lestini, an expert in orthopedic surgery, testified that in his opinion plaintiff was employable within light to medium duty work and that it would be beneficial for plaintiff to “find[] some type of work that he can tolerate” to condition his back.

Dr. Cook, who specializes in internal medicine and kidney disease, began treating plaintiff after plaintiff falsely informed him that Dr. Gwinn was no longer in practice. Dr. Cook opined that plaintiff was unable to perform any level of physical activity that would require standing or sitting for more than twenty minutes, bending, squatting, or lifting more than five pounds. In summary, all expert witnesses agreed that plaintiff was capable of performing some level of work with limitations, and the employer showed that jobs were available that met the work restrictions.

The Commission found the following relevant facts:

12. Mr. Alford located approximately twelve (12) job leads for plaintiff who attended many interviews. However, *no job was*

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ever officially offered to plaintiff due to his physical condition and restrictions resulting from his 24 October 1996 compensable injury. Furthermore, in no manner were plaintiff's actions regarding these job leads inappropriate and he did not constructively refuse suitable employment.

. . . .

18. *Because no job was ever offered to plaintiff, it cannot be found that he unjustifiably refused suitable employment.*

19. Plaintiff's pain is constant and severe.

20. Dr. Gwinn's opinion that plaintiff had "likely" reached maximum medical improvement is not given weight. This is so because it is clear from the evidence that plaintiff continues to experience debilitating pain as the result of his 24 October 1996 injury by accident.

21. The Full Commission gives greater weight to the testimony and opinions of Dr. Cook as opposed to testimony and opinions of Dr. Gwinn and Mr. Alford.

(Emphasis supplied).

The Commission applied the incorrect legal standard in finding that plaintiff did not constructively refuse suitable employment because no job was ever offered. The legal standard is not whether a job was actually offered, but whether suitable jobs are available and whether plaintiff is capable of getting one. *Burwell*, 114 N.C. App. at 74, 441 S.E.2d at 149 (1990) (citing *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 732, 403 S.E.2d 548, 551, *disc. review denied*, 329 N.C. 505, 407 S.E.2d 553 (1991)). "*It is not necessary . . . that the employer show that some employer has specifically offered plaintiff a job.*" *Id.* (Emphasis supplied). Defendants clearly met their burden, and plaintiff has failed to prove that suitable jobs were unavailable and that he diligently sought the employment opportunities located by his employer.

Plaintiff made false statements not only during his testimony at the hearing, but also lied to Dr. Cook concerning the reason why he was no longer being treated by Dr. Gwinn. The Commission's reasoning regarding Dr. Gwinn's testimony that plaintiff had "likely" reached maximum medical improvement is also inconsistent. Dr. Cook opined that plaintiff had reached maximum medical improvement. All expert medical testimony concurred that plaintiff had attained maximum

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medical improvement. There is insufficient competent evidence to support the Commission's conclusions. We review *de novo* the Commission's conclusions of law. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998).

The Commission fails to disclose the reason it gave greater weight to the testimony and opinions of Dr. Cook. The Commission also failed to resolve the inconsistency between Dr. Lestini's opinion, which was consistent with that of Dr. Gwinn and that of Dr. Cook. The Commission's finding implies that it gave greater weight to plaintiff's self-serving testimony than either the expert testimony of Dr. Cook, Dr. Gwinn, Dr. Lestini, and Mr. Alford. It is well settled that the authority to find facts is vested in the Commission, and like any other trier of facts, the Commission is the sole judge of the credibility and weight of the evidence. *Moses*, 238 N.C. at 718, 78 S.E.2d at 926 (citations omitted).

However, the Commission is not free to utterly ignore all competent evidence, properly admitted, nor is the Commission free to not adjudicate between conflicting competent evidence. Our standard of review, although narrow, does not prohibit this Court from requiring the Commission to exercise its statutory function and to base and render its opinions on all competent evidence properly admitted into the record for its consideration.

The majority's opinion mechanically recites the "standard of review" and feels constrained to defer to the Commission's findings of fact and conclusions of law, even where the Commission's decision reflects that it applied the incorrect legal standard, ignored properly admitted expert testimony, and failed to resolve conflicting evidence in the record.

As the Commission committed errors of law, I would reverse the Opinion and Award of the Commission. I respectfully dissent.

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STATE OF NORTH CAROLINA v. CHARLES GILBERT MURPHY

No. COA01-695

(Filed 20 August 2002)

1. Sentencing— aggravating factor—took advantage of position or trust or confidence—false pretenses

The trial court did not err in obtaining property by false pretenses cases (98CRS 72458-72461) arising out of defendant's loan brokering scheme by finding as an aggravating factor under N.C.G.S. § 15A-1340.16(d)(15) that defendant took advantage of a position of trust or confidence to commit the offenses, because: (1) the evidence of defendant's loan brokering scheme demonstrates the existence of a relationship between defendant and the victims generally conducive to reliance of one upon the other; and (2) defendant held himself out as a legitimate businessman with the ability to obtain financing for loans for the victims, and the victims placed great trust and confidence in defendant that he would follow through on his representation and not defraud them of their money.

2. Sentencing— aggravating factor—took advantage of position or trust or confidence—false pretenses—embezzlement

The trial court erred in an obtaining property by false pretenses case (98CRS 30353) involving the Swim Association by finding as an aggravating factor under N.C.G.S. § 15A-1340.16(d)(15) that defendant took advantage of a position of trust or confidence to commit the offense, and the case is remanded for resentencing, because: (1) the relationship between defendant and the Swim Association presents a classic case of embezzlement which is the wrongful conversion of property which was initially acquired lawfully pursuant to a trust relationship, whereas false pretenses is the unlawful acquisition of property pursuant to a false representation; (2) N.C.G.S. § 14-100 provides that a defendant may be convicted of embezzlement upon an indictment charging him with false pretenses, and defendant's guilty plea in this case is treated as a guilty plea to the crime of embezzlement; and (3) evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and to be guilty of embezzlement defendant must have initially received the property in question lawfully pursuant to a trust relationship.

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3. Sentencing— aggravating factor—took advantage of position or trust or confidence—guilty plea to false pretenses

The trial court was not precluded in obtaining property by false pretenses cases (98CRS 72458-72461) arising out of defendant's loan brokering scheme from finding the trust or confidence aggravating factor under N.C.G.S. § 15A-1340.16(d)(15) even though defendant contends his guilty plea on false pretenses charges operated as an acquittal on the charge of embezzlement arising from the same transactions, which allegedly collaterally estopped the State from relitigating the issue of whether a relationship of trust or confidence existed between defendant and the victims, because: (1) the critical distinction between embezzlement and false pretenses is not the presence or absence of a position of trust or confidence, but whether the property at question was initially obtained lawfully or unlawfully; and (2) a defendant may take advantage of a position of trust or confidence in order to obtain property unlawfully pursuant to a false representation.

4. Sentencing— mitigating factor—person of good character or good reputation in community—false pretenses

The trial court did not err in obtaining property by false pretenses cases by failing to find as a mitigating factor under N.C.G.S. § 15A-1340.16(e)(12) that defendant has been a person of good character or has had a good reputation in the community in which he lives, because although defendant presented letters from twenty-four individuals attesting to the quality of defendant's character, this evidence does not rise to the level of being manifestly credible when: (1) six of the letters were written by prisoners whose only contact with defendant occurred while defendant was incarcerated; and (2) the vast majority of the remaining letters were written by family members, fellow church members, neighbors, or close friends, and the relationship of the individuals who wrote the letters to defendant is a factor which the factfinder may consider in assessing the credibility of those individuals.

Appeal by defendant from judgments entered 15 February 2000 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 27 March 2002.

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Attorney General Roy Cooper, by Assistant Attorney General Thomas M. Woodward, for the State.

Ligon and Hinton, by Lemuel W. Hinton, for defendant-appellant.

CAMPBELL, Judge.

Defendant was indicted on six counts of obtaining property by false pretenses (hereinafter, “false pretenses”) in violation of N.C. Gen. Stat. § 14-100. In five of the counts (98 CRS 72457-72461), the State alleged that defendant obtained money with the intent to defraud by falsely representing that he had brokered business loans for the victims and that they needed to make a good faith down payment in order to finalize the loan transactions. When the loans did not materialize and the victims confronted defendant, he failed to return their down payments. In the sixth count (99 CRS 30353), the State alleged that defendant withdrew money from the bank account of the Tarheel Swim Association (“the Swim Association”) and converted it to his own use without the consent and authority of the Swim Association.

Defendant pled guilty to all six counts of false pretenses and a sentencing hearing was held in Wake County Superior Court before Judge Bullock. Defendant stipulated to being sentenced at prior record level II. Following a summary of the charges by the State, the presentation of evidence and the arguments of counsel, the trial court found the following aggravating factors: In 98 CRS 72457, the trial court found as an aggravating factor that the offense involved the actual taking of property of great monetary value. In 98 CRS 72458, the transcript of the sentencing hearing indicates that the trial court found as an aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense.¹ In the four remaining cases, 98 CRS 72459, 98 CRS 72460, 98 CRS 72461 and 99 CRS 30353, the transcript indicates that the trial court found two aggravating factors: (1) that the offense involved the actual taking of

1. However, the “Felony Judgment Findings of Aggravating and Mitigating Factors” form indicates that the only aggravating factor found by the trial court in 98 CRS 72458 was that the offense involved the actual taking of property of great monetary value. The fact that box number 14b on the form was checked instead of box number 15 is an obvious clerical error because it is inconsistent with the trial court’s actual findings, which we view as controlling in the trial court’s sentencing of defendant in the instant case. *See State v. Gell*, 351 N.C. 192, 218, 524 S.E.2d 332, 349 (2000).

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property of great monetary value, and (2) that defendant took advantage of a position of trust or confidence to commit the offense.²

In all six cases, the trial court found as the sole mitigating factor that defendant had accepted responsibility for his criminal conduct. The trial court then found that the aggravating factors outweighed the mitigating factors in all six cases.³ Accordingly, the trial court sentenced defendant in the aggravated range on all six charges and ordered defendant incarcerated for consecutive prison terms of 10 to 12 months. Defendant appeals his sentences pursuant to N.C. Gen. Stat. § 15A-1444(a1). Defendant contends (1) that the trial court erred in finding as an aggravating factor that defendant took advantage of a position of trust or confidence to commit the offenses, and (2) that the trial court erred in failing to find as a mitigating factor that defendant has been a person of good character or has had a good reputation in the community in which he lives.

[1] Defendant first argues that the record lacked sufficient evidence to support the trial court's finding as an aggravating factor that he took advantage of a position of trust or confidence. N.C. Gen. Stat. § 15A-1340.16(d)(15) (2001).⁴

The State bears the burden of proving the existence of an aggravating factor by a preponderance of the evidence. N.C.G.S. § 15A-1340.16(a); *State v. Noffsinger*, 137 N.C. App. 418, 528 S.E.2d 605 (2000). In *State v. Daniel*, 319 N.C. 308, 354 S.E.2d 216 (1987), our Supreme Court held that a finding of the "trust or confidence" aggravating factor depends "upon the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other." *Id.* at 311, 354 S.E.2d at 218; accord *State v. Mann*, 355 N.C. 294, 319, 560 S.E.2d 776, 791 (2002). As the Supreme Court recently observed in *Mann*, our courts have upheld a finding of the "trust or confidence" factor in very limited factual circumstances. *See, e.g., State v. Farlow*, 336 N.C. 534, 444 S.E.2d 913 (1994) (factor

2. The "Felony Judgment Findings of Aggravating and Mitigating Factors" forms for these four cases do not make it clear that the trial court found that the offenses involved the actual taking of property of great monetary value. The fact that box number 14b was not checked on the forms is an obvious clerical error. *See Gell*, 351 N.C. at 218, 524 S.E.2d at 349.

3. The trial court failed to check the appropriate box on the "Felony Judgment Findings of Aggravating and Mitigating Factors" forms to indicate this finding. Again, we view this as a clerical error. *See Gell*, 351 N.C. at 218, 524 S.E.2d at 349.

4. This argument does not apply to 98 CRS 72457 because the trial court did not find the "trust or confidence" aggravating factor in that case.

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properly found where nine-year-old victim of sexual offense spent great deal of time in adult defendant's home and essentially lived with defendant while mother, a long-distance truck driver, was away); *State v. Arnold*, 329 N.C. 128, 404 S.E.2d 822 (1991) (factor properly found where defendant conspired to kill her husband, who came to believe that defendant had a change of heart and ended her extra-marital affair with another); *Daniel*, 319 N.C. at 311, 354 S.E.2d at 218 (factor properly found where defendant murdered her newborn child); *State v. Stanley*, 74 N.C. App. 178, 327 S.E.2d 902 (1985) (factor properly found where defendant raped nineteen-year-old mentally retarded female who lived with defendant's family and who testified that she trusted and obeyed defendant as an authority figure); *State v. Baucom*, 66 N.C. App. 298, 311 S.E.2d 73 (1984) (factor properly found where adult defendant sexually assaulted his ten-year-old brother); *State v. Potts*, 65 N.C. App. 101, 308 S.E.2d 754 (1983) (factor properly found where defendant shot best friend who thought of defendant as a brother). *But see Mann*, 355 N.C. at 320, 560 S.E.2d at 792 (factor not properly found where victim occasionally drove defendant co-worker to work and met with defendant to discuss unemployment benefits after defendant's lay-off; the evidence at most showed a cordial working relationship, perhaps even a friendship); *State v. Erlewine*, 328 N.C. 626, 403 S.E.2d 280 (1991) (factor not properly found where defendant shared an especially close relationship with his drug dealer, the murder victim); *State v. Midyette*, 87 N.C. App. 199, 360 S.E.2d 507 (1987) (factor not properly found where defendant and victim had been acquainted for approximately one month before the murder and where victim had once asked defendant to join her and her sister for breakfast at victim's apartment); *State v. Carroll*, 85 N.C. App. 696, 355 S.E.2d 844 (1987) (factor not properly found where defendant and victim had met only one and a half days before the murder and had decided to take a trip together in defendant's car).

These cases reveal that our appellate courts have most often considered and upheld the "trust or confidence" factor in the context of crimes against the person committed by a defendant who shared a friendship or familial relationship with the victim. However, this Court has held that the "trust or confidence" aggravating factor is not limited to friendships and familial relationships. *State v. Carter*, 122 N.C. App. 332, 470 S.E.2d 74 (1996); *see also State v. Hammond*, 118 N.C. App. 257, 454 S.E.2d 709 (1995) (stating in *dicta* the Court's belief that the "trust or confidence" factor is not limited to friendships and familial relationships). In addition, this Court has consid-

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ered and upheld the "trust and confidence" factor outside the context of a crime against the person. See *Carter*, 122 N.C. App. at 339, 470 S.E.2d at 79 (1996).

In *Carter*, the defendant was a university student who had been entrusted by one of his professors with the security access code to a computer lab with the expectation that the student would behave in a responsible and trustworthy fashion. The security access code gave the defendant access to computer equipment worth thousands of dollars. The defendant was charged and convicted of felony larceny of numerous pieces of computer equipment belonging to the university. The defendant argued that the "trust or confidence" aggravating factor did not apply because the victim was not an individual and the relationship between the defendant and the university was not one of trust or confidence which caused the university to rely on the defendant. This Court noted the preexisting relationship between the defendant and the university and concluded that the defendant had taken advantage of the trust and confidence placed in him by his professor on behalf of the university. *Id.* at 339, 470 S.E.2d at 79.

At the outset of the sentencing hearing in the case *sub judice*, the State presented a summary of the factual basis for the charges against defendant.⁵ The State's summary tended to show the following: In the Summer of 1998, defendant represented himself as being affiliated with LCE Leasing Company, a company specializing in brokering large commercial loans. Potential clients seeking to obtain financing to start or expand businesses were referred to defendant by Nationwide Mortgage Company, a separate business entity. These potential clients were told that defendant would be able to secure the large loans they were seeking. Defendant told the clients that in order to prove their good faith and ability to repay the loans they would need to pay defendant a first and last month installment payment on the loans. The State contended that "either the companies that this defendant told [the clients] would [finance] the loans . . . did not exist or they were front companies for other businesses." When the funds from the loans were not forthcoming, the clients began to question defendant. Defendant told the clients that the loans were being processed or that he was having problems with third parties involved

5. When a defendant pleads guilty, the trial court may rely upon the circumstances surrounding the offense, including factual allegations in the indictment, in determining whether aggravating factors exist. See *State v. Thompson*, 314 N.C. 618, 336 S.E.2d 78 (1985); *State v. Sammartino*, 120 N.C. App. 597, 463 S.E.2d 307 (1995); *State v. Flowe*, 107 N.C. App. 468, 420 S.E.2d 475 (1992).

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in the transactions. The clients eventually became frustrated and reported the matter to law enforcement.

This loan brokering scheme gave rise to five of the six charges against defendant in the instant case (98 CRS 72457-72461). The victims and the amount of money defendant obtained from each, as set forth in the respective indictments, is as follows: Richard Bennot (\$36,680.00), Alice Huang (\$11,680.00), Emily Easter-Grant (\$9,850.00), Kang Seok Lee (\$60,900.00), and Henry Grassi (\$13,340.00).

The State summarized the evidence against defendant in the sixth case (99 CRS 30353) as follows: In his position with the Swim Association, defendant had access to the Swim Association's financial books and bank account. When word got out that defendant had been indicted in connection with his loan brokering scheme, members of the Swim Association asked for him to return the Swim Association's books, but defendant was unwilling to turn them over. When the Swim Association finally recovered its books, it discovered that defendant had withdrawn \$22,220.50 from its bank account for his own use. Following the State's summary of the factual basis supporting the charges, defendant declined an opportunity to add or object to the State's summary. Accordingly, the State's summary was properly considered by the trial court in making its sentencing determination.

Richard Bennot ("Bennot"), one of the victims of defendant's loan brokering scheme, also testified at the sentencing hearing. Bennot testified that he contacted Nationwide Mortgage Company for assistance in securing a loan for a health and fitness center. Nationwide referred Bennot to defendant, and the two parties eventually came to an agreement on a loan. Defendant requested a first payment from Bennot in the amount of \$36,680.00. Bennot wrote a cashier's check in that amount to LCE Leasing Company and turned it over to a representative of the company at an arranged meeting at the offices of Nationwide Mortgage Company. Bennot never received the proceeds from the agreed upon loan nor was his initial payment of \$36,680.00 ever returned to him.

Kang Seok Lee ("Lee"), another one of defendant's victims, also testified at the sentencing hearing. Lee's testimony corroborated the testimony of Bennot and the summary of the evidence provided by the State. Specifically, Lee testified that he gave defendant \$60,990.00

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as a down payment on a loan for a martial arts academy. Lee never received the loan or his down payment back.

We conclude that the evidence of defendant's loan brokering scheme demonstrates "the existence of a relationship between the defendant and [the victims in 98 CRS 72458-72461] generally conducive to reliance of one upon the other." *Daniel*, 319 N.C. at 311, 354 S.E.2d at 218. Defendant held himself out as a legitimate businessman with the ability to obtain financing for loans for the victims. Defendant represented to the victims that in order to secure the loans from third parties he would need an initial down payment as a good faith gesture that the victims were serious about obtaining the loans and had the ability to repay them. Relying on defendant's representations, the victims then turned over large amounts of money, in one instance more than \$60,000.00, to defendant with the expectation that defendant would use the money to secure the loans and that they would in fact receive the funds from the promised loans. In so doing, the victims placed great trust and confidence in defendant that he would follow through on his representations and not defraud them of their money. Instead, the victims did not receive the promised loans and defendant failed to return their down payments. As a result, defendant violated the trust and confidence placed in him by the victims. Accordingly, we conclude that there was sufficient evidence to support the trial court's finding of the "trust or confidence" aggravating factor in the five cases arising out of defendant's loan brokering scheme (98 CRS 72458-72461).

[2] In the case involving the Swim Association (99 CRS 30353), we likewise conclude that the evidence was sufficient to support a finding that defendant took advantage of a position of trust or confidence. The State's summary of the factual basis for the charge in 99 CRS 30353, which defendant failed to object to, showed that defendant maintained a position with the Swim Association that provided him with access to the financial books and bank accounts belonging to the Swim Association and allowed him to write checks on the bank accounts. This position placed defendant in a fiduciary capacity in his relationship with the Swim Association. Defendant was not given consent and authority to use the Swim Association's money for anything other than Swim Association business. In complete disregard of this position of trust, defendant withdrew money from the Swim Association's account and converted it to his own use. There can be no doubt that the relationship between defendant and the Swim Association was one in which the Swim Association placed a high

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level of trust and reliance in defendant. Accordingly, there was ample evidence that defendant took advantage of a position of trust or confidence in 99 CRS 30353.

Nonetheless, we conclude that the trial court erred in finding the “trust or confidence” aggravating factor in 99 CRS 30353 because the summary of the evidence of the relationship between defendant and the Swim Association presents a classic case of embezzlement. Embezzlement is the wrongful conversion of property which was initially acquired lawfully, pursuant to a trust relationship. *State v. Speckman*, 326 N.C. 576, 578, 391 S.E.2d 165, 166 (1990) (citing *State v. Griffin*, 239 N.C. 41, 45, 79 S.E.2d 230, 233 (1953)). On the other hand, false pretenses is the unlawful acquisition of property, pursuant to a false representation. *Id.* The crimes of embezzlement and false pretenses are mutually exclusive offenses; a defendant cannot be convicted of both embezzlement and false pretenses based upon a single transaction. *Id.* However, N.C.G.S. § 14-100 “clearly provides that a defendant may be convicted of embezzlement upon an indictment charging him with false pretenses.” *Id.* at 579, 391 S.E.2d at 167. Accordingly, defendant could have properly been convicted of embezzlement based on the indictment in the Swim Association case if the evidence submitted to the jury tended to show that the transaction amounted to embezzlement. *See id.* The evidence presented at the sentencing hearing concerning the relationship between defendant and the Swim Association clearly shows that defendant gained access to the Swim Association’s bank account lawfully, pursuant to a trust relationship. Consequently, we treat defendant’s guilty plea in the Swim Association case as a guilty plea to the crime of embezzlement.

N.C. Gen. Stat. § 15A-1340.16(d) (2001) provides: “Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation” As earlier noted, to be guilty of embezzlement, a defendant must have initially received the property in question lawfully, pursuant to a trust relationship. *Speckman*, 326 N.C. at 578, 391 S.E.2d at 166. Thus, “proof of embezzlement necessarily involves proof of a position of trust and the trial court erred in finding as an aggravating factor that defendant violated a position of trust.” *State v. Mullaney*, 129 N.C. App. 506, 511, 500 S.E.2d 112, 115-16 (1998). Accordingly, we remand 99 CRS 30353 for resentencing on defendant’s plea of guilty to the crime of embezzlement. Upon remand, the trial court is precluded from finding the “trust or confidence” aggravating factor.

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[3] Defendant next argues that the trial court was precluded from finding the “trust or confidence” aggravating factor because defendant’s guilty plea on the false pretenses charges necessarily operated as an acquittal on the charge of embezzlement arising from the same transactions, and, since an essential element of embezzlement is that the property in question initially be acquired lawfully pursuant to a trust relationship, the State was collaterally estopped from relitigating the issue of whether a relationship of trust or confidence existed between defendant and the victims. We disagree.⁶

While we recognize the mutually exclusive nature of the crimes of embezzlement and false pretenses, and the fact that a defendant may not be convicted of both arising from the same act or transaction, defendant misinterprets the critical distinction between the two crimes. The critical distinction between embezzlement and false pretenses is not the presence or absence of a position of trust or confidence, but rather whether the property at question was initially obtained lawfully or unlawfully, *i.e.*, with the intent to defraud. *See Speckman*, 326 N.C. at 578, 391 S.E.2d at 166-67 (“This Court has previously held that, since property cannot be obtained simultaneously pursuant to both lawful and unlawful means, guilt of either embezzlement or false pretenses necessarily excludes guilt of the other.”). Thus, a guilty plea to false pretenses, which necessarily excludes guilt of embezzlement, is not a final determination with preclusive effect on the issue of whether defendant took advantage of a position of trust or confidence in obtaining the property. A defendant may take advantage of a position of trust or confidence in order to obtain property unlawfully, pursuant to a false representation. Therefore, a guilty plea to false pretenses does not preclude a finding of the “trust or confidence” aggravating factor.

[4] In his final argument, defendant contends that the trial court erred in failing to find as a mitigating factor that he was a person of good character or had a good reputation in the community in which he lives. N.C. Gen. Stat. § 15A-1340.16(e)(12) (2001). In support of this mitigating factor, defendant presented letters from twenty-four individuals attesting to the quality of his character. The individuals who wrote the letters included family members, close friends, fellow church members, members of the community with whom defendant

6. Having held that defendant’s plea of guilty in the Swim Association case amounted to a plea of guilty to embezzlement, we only consider this argument as it relates to the cases arising out of defendant’s loan brokering scheme, which we view as true false pretenses cases.

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had worked, and prisoners with whom defendant had been incarcerated. These letters paint a picture of a devoted family man with three children who was active in his church and his community. Specifically, they show that defendant was active in the PTA, volunteered his time to coach youth athletic teams, once served as president of the high school athletic club, served on the board of the homeowners' association, ran for a seat on the town council, sponsored refugees from Africa, and was an active member of Bible study while serving time in prison. Defendant argues that this evidence of his character and reputation was uncontradicted, substantial, manifestly credible and clearly established his good character and reputation in the community. Thus, defendant maintains that the trial court erred in not finding the "good character or reputation" mitigating factor.

When a defendant produces evidence of his character in order to take advantage of the "good character or reputation" mitigating factor, character becomes a direct issue in the case and may be proved by specific acts as well as by the opinions of others as to the defendant's reputation. *State v. Benbow*, 309 N.C. 538, 547, 308 S.E.2d 647, 652-53 (1983). When such evidence of good character and reputation is "uncontradicted, substantial and manifestly credible, the sentencing judge may not simply ignore it." *State v. Freeman*, 313 N.C. 539, 551, 330 S.E.2d 465, 474-75 (1985) (citing *State v. Jones*, 309 N.C. 214, 218-19, 306 S.E.2d 451, 454 (1983)); see also *State v. Ruff*, 127 N.C. App. 575, 581, 492 S.E.2d 374, 377 (1997). When a defendant argues that his evidence is sufficient to compel the finding of a mitigating factor, he bears the same burden of persuasion of a party seeking a directed verdict; he must demonstrate that the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn and that the credibility of the evidence is manifest as a matter of law. *Freeman*, 313 N.C. at 551, 330 S.E.2d at 475.

Having reviewed each of the twenty-four letters presented by defendant, we cannot say that the trial judge erred when he concluded that this evidence was insufficient to establish as a matter of law that defendant was a person of good character or had a good reputation in his community. Although the letters provide uncontradicted evidence of defendant's good character, this evidence does not rise to the level of being manifestly credible. Six of the letters were written by prisoners whose only contact with defendant occurred while defendant was incarcerated. Therefore, these individuals had no knowledge of defendant's general character and reputation in the community in which he lived prior to being arrested. We also question

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the general credibility of these prisoners as character references. In addition, the vast majority of the remaining letters were written by family members, fellow church members, neighbors, or close friends of defendant. Although not necessarily detracting from their credibility, the relationship of the individuals who wrote the letters to defendant is a factor which the factfinder may consider in assessing the credibility of those individuals. Thus, we conclude that it was within the prerogative of the trial court to accept or reject the opinions set forth in the letters. *See State v. Taylor*, 309 N.C. 570, 578, 308 S.E.2d 302, 308 (1983); *Benbow*, 309 N.C. at 548, 308 S.E.2d at 653.

We do not suggest that the letters presented by defendant would not have supported a finding by the trial court that defendant was a person of good character and good reputation in the community in which he lived. We simply have pointed to factors that may call into question the credibility of the vast majority of individuals who wrote letters on behalf of defendant's character and reputation. As a result, we conclude that the letters presented by defendant are not of such quality and definiteness as to be overwhelmingly persuasive on the question of defendant's good character or good reputation. Thus, the trial court was not compelled to find the "good character or reputation" mitigating factor. Defendant's final argument is overruled.

In conclusion, we hold that the trial court erred in finding as an aggravating factor in 99 CRS 30353 that defendant took advantage of a position of trust or confidence. As to the other cases, we hold that the trial court did not err in finding the "trust or confidence" aggravating factor. Finally, as to all cases, we hold that the trial court did not err in failing to find the "good character or reputation" mitigating factor. This matter is remanded for resentencing in 99 CRS 30353 consistent with this opinion and affirmed in all other respects.

Affirmed in part and remanded in part.

Judges WALKER and McGEE concur.

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THOMAS STEWART KROH, PLAINTIFF v. TERESA LEDFORD KROH, DEFENDANT

No. COA01-1027

(Filed 20 August 2002)

1. Eavesdropping— Electronic Surveillance Act—illegal recording of in-home conversations and actions

The trial court erred in an action arising out of defendant wife's illegal recording of plaintiff husband's in-home conversations and actions by granting plaintiff husband partial summary judgment on his Electronic Surveillance Act claim, because: (1) defendant's videotaping of her husband would not violate the Electronic Surveillance Act unless such videotaping also included an audio recording, and the record fails to show any evidence or allegation of plaintiff establishing that the subject videotape included sound recordings, N.C.G.S. § 15A-286(14); and (2) although defendant placed voice-activated recorders throughout the family residence, the Court of Appeals adopts the vicarious consent doctrine permitting a custodial parent to vicariously consent to the recording of a minor child's conversations, and defendant presented some evidence showing that she undertook the taping of her husband to protect her children.

2. Evidence— hearsay—veterinary reports—bestiality— authentication

The trial court did not err by excluding the veterinary reports proffered by defendant wife at trial to support defendant's claims of alleged bestiality against her husband based on hearsay and improper authentication, because: (1) N.C.G.S. § 8C-1, Rule 901(b)(1) provides that a witness with knowledge of a matter may testify that a matter is what it is claimed to be, and there is no evidence that either veterinarian who made the notes in the reports was unavailable as a witness as defined in N.C.G.S. § 8C-1, Rule 804(a); (2) the proffered veterinary reports contained the notes of the veterinarians and did not contain statements by defendant concerning her state of mind except to the extent that she read them and interpreted them, N.C.G.S. § 8C-1, Rule 803(3); (3) defendant was required to produce the original reports as required by N.C.G.S. § 8C-1, Rule 1002 and properly authenticate them under N.C.G.S. § 8C-1, Rule 901 since she was offering these reports into evidence to prove their contents; and (4) the reports were in fact considered by the trial court and the trial court found

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there was nothing in the reports that would substantial defendant's claim that plaintiff had sex with the family dog, that the dog had otherwise been tampered with, or that whoever allegedly did so might also molest children.

3. Libel and Slander— slander per se—bestiality—child molestation

The trial court did not err by finding defendant wife liable for slander per se for her statements to various individuals that her husband was having sex with the family dog and molesting her children, because: (1) false accusations of crime or offenses involving moral turpitude are actionable as slander per se; (2) although N.C.G.S. § 7B-301 imposes an affirmative duty upon anyone who has cause to suspect child abuse or neglect to report such conduct to the county Department of Social Services (DSS) and N.C.G.S. § 7B-309 provides immunity from civil liability for a person who reports such conduct and acts in good faith, statements to anyone other than persons with DSS concerning allegations that plaintiff molested defendant's minor sons would not be protected; (3) defendant acted with actual malice, thus negating any qualified immunity she otherwise would have enjoyed under N.C.G.S. § 7B-309 for her statements to DSS, when she made these statements with knowledge that they were false or with reckless disregard for their truth or a high degree of awareness of the probability of their falsity; and (4) plaintiff proved by clear and convincing evidence that defendant's statements were made with malice as defined in N.C.G.S. § 1D-5.

Appeal by defendant from order entered 7 January 2000 and judgment entered 28 December 2000 by Judge Howard R. Greenson, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 15 May 2002.

Moss, Mason & Hill, by Matthew L. Mason and William L. Hill, for the plaintiff-appellee.

Smith, James, Rowlett & Cohen, LLP, by Seth R. Cohen, for the defendant-appellant.

WYNN, Judge.

This appeal by defendant wife arises from a civil judgment against her stemming from her illegal wiretapping of her plaintiff husband's in-home conversations and actions. She presents the following

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issues on appeal: (I) Does the Electronic Surveillance Act apply to non-consensual recordings by one spouse of the other in their family home? If so, were there issues of fact in this case precluding summary judgment on the Electronic Surveillance Act claims? (II) Did the trial court properly exclude veterinary reports that the wife contends support her allegations of bestiality against the husband? (III) Did the trial court err in finding the wife liable for slander *per se* for her statements to various individuals concerning her suspicions that her husband was having sex with the family dog and molesting her children? We answer the first issue, yes, but reverse because there were issues of fact precluding summary judgment on this issue. However, we affirm the exclusion of the veterinary reports for failure of the wife to authenticate the exhibits, and affirm in part, and vacate and remand in part, the trial court's bench judgment on the husband's slander *per se* claims.

Thomas and Teresa Kroh married in 1992 and separated in early December 1998. During the marriage and at the time of the alleged acts giving rise to this action in November and December 1998, the couple lived together along with Teresa Kroh's thirteen and ten year old sons from a prior marriage. At all relevant times, Thomas Kroh worked as a police officer with the Greensboro Police Department.

On numerous occasions throughout the marriage, Teresa Kroh accused Thomas Kroh of having affairs with other women; these accusations became more frequent during the spring and early fall of 1998. In early November 1998, unbeknownst to her husband, Teresa Kroh placed tape recorders in the family home, and later placed a video camera in the home. As a result, she obtained audio and video recordings from these devices without her husband's knowledge. In a conversation before Thanksgiving in November 1998, Teresa Kroh accused her husband of having sexual relations with the family dog, and claimed to have captured the event on tape. Her husband subsequently informed her that he wished to end the marriage.

Around the first of December 1998, Teresa Kroh reported to the State Bureau of Investigation that her husband had engaged in sexual conduct with the family dog, and had molested her two minor sons. The next day, she telephoned her husband's sister, Nancy Dowell, and told Ms. Dowell that Thomas Kroh had molested their two minor sons and had been having sex with the family dog. Around the same time, Teresa Kroh telephoned her husband's long-time friend, Richard Herrin, and stated to him that her husband had engaged in sex with

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the family dog. When Herrin and her husband's co-worker, Steve Hollers, went to retrieve some of her husband's belongings from the family home, Teresa Kroh stated to Herrin, in the presence of Hollers, not to allow her husband near Herrin's dogs.

In March 1999,¹ Thomas Kroh brought this action against Teresa Kroh alleging causes of action against her for (1) abuse of process, (2) defamation, (3) violation of North Carolina's Electronic Surveillance Act, Art. 16 of Chapter 15A of the General Statutes (N.C. Gen. Stat. §§ 15A-286 *et seq.* (2001)), and (4) intentional infliction of emotional distress. He later amended his complaint to add a cause of action for negligent infliction of emotional distress. Teresa Kroh answered, asserting various affirmative defenses, including the truth of her allegations.

On 7 January 2000, Superior Court Judge Howard R. Greeson, Jr., granted summary judgment in favor of Thomas Kroh on his claims under the Electronic Surveillance Act and awarded \$1,000.00 in compensatory damages under G.S. § 15A-296. Following a bench trial on the remaining claims, Judge Greeson found Teresa Kroh liable for slander *per se*, and awarded Thomas Kroh \$20,000 in compensatory damages, \$60,000 in punitive damages for slander *per se*, and \$5,000 in punitive damages for violation of the Electronic Surveillance Act. This appeal followed.

(I)

[1] On appeal, we first address the issues of whether the Electronic Surveillance Act applies to non-consensual recordings by one spouse of the other in their family home; and if so, were there issues of fact in this case precluding summary judgment on the Electronic Surveillance Act claims. We answer: Yes, the Electronic Surveillance Act prohibits non-consensual recordings by one spouse of the other even within their family home; and, yes, there are issues of fact that preclude summary judgment in this case.²

1. Also in March 1999, Teresa Kroh filed an action for divorce, post-separation support, alimony, equitable distribution, interim allocation, and a request for a temporary restraining order and a preliminary injunction. She alleged therein that Thomas Kroh had "engaged in deviant sexual activities" and had endangered the lives of her and her children by engaging in illicit sexual acts without taking reasonable precautions.

2. Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" and that a party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 (2001).

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North Carolina's Electronic Surveillance Act creates a Class H felony of conduct whereby a person, without the consent of at least one party to the communication, "[w]illfully intercepts, [or] endeavors to intercept, . . . any . . . oral . . . communication." G.S. § 15A-287(a)(1). An "oral communication" includes all oral communications "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such [an] expectation[.]" G.S. § 15A-286(17). The Act defines "intercept" to mean "the aural or other acquisition of the contents of any . . . oral . . . communication through the use of any electronic, mechanical, or other device." G.S. § 15A-586(13). Thus, in general, recording or endeavoring to record a person's private conversations without the consent of a party to the conversation is a Class H felony under the Electronic Surveillance Act. *See* G.S. § 15A-286.

Additionally, G.S. § 15A-296 creates a *civil* cause of action for persons whose communications are intercepted, disclosed or used in violation of the Electronic Surveillance Act against the person(s) violating the Act, and provides for the recovery of damages, attorneys' fees and litigation costs associated therewith. *See* G.S. § 15A-296(a). This statute, by its plain language, requires the *actual* interception, disclosure, or use of a communication as a prerequisite to maintaining a civil action and obtaining civil damages, in contrast to G.S. § 15A-286, which criminalizes a mere *endeavor* to intercept such a communication.

While our courts have not previously construed the Electronic Surveillance Act, we note the many similarities between the Electronic Surveillance Act and the federal wiretapping statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. § 2510 *et seq.* (2000) (the "Omnibus Act"). The Omnibus Act creates a civil cause of action for intercepting, disclosing, or intentionally using an oral communication in violation of the Omnibus Act. *See* 18 U.S.C.A. § 2520 (2000). Like G.S. § 15A-287, the Omnibus Act prohibits persons from intentionally intercepting, or endeavoring to intercept, any oral communication. *See* 18 U.S.C.A. § 2511(1)(a).

In this case, Teresa Kroh admits that she videotaped her husband's activities. However, under the plain language of G.S. § 15A-287(1)(a) (as well as the federal Omnibus Act), only oral communications are covered by the Act. Thus, Teresa Kroh's videotaping of her husband would not violate the Electronic Surveillance Act unless such videotaping also included an audio recording. *See* G.S.

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§ 15A-286(14) (definition of “intercept” includes the aural acquisition of oral communications); *see also* *U.S. v. Torres*, 751 F.2d 875, 880 (7th Cir. 1984) (video “surveillance (with no soundtrack) just is not within the statute’s domain”), *cert. denied*, 470 U.S. 1087, 85 L. Ed. 2d 150 (1985); *U.S. v. Andonian*, 735 F. Supp. 1469, 1472 (C.D.Cal. 1990) (“video surveillance is not governed by Title III” of the Omnibus Act), *affirmed*, 29 F.3d 634 (9th Cir. 1994), *cert. denied*, 513 U.S. 1128, 130 L. Ed. 2d 883 (1995). Because the record fails to show any evidence or allegation by Thomas Kroh establishing that the subject videotaping included sound recordings, we summarily reverse the trial court’s order granting him partial summary judgment on his claim of illegal videotaping under the Electronic Surveillance Act.

Teresa Kroh further admits that she placed voice-activated recorders throughout the family residence, and recorded Thomas Kroh without his consent at times during November and December 1998. Under the plain language of G.S. § 15A-287(1)(a), her tape-recordings of Thomas Kroh’s conversations constituted willfully intercepting (or endeavoring to intercept) an oral communication. However, intercepting (or endeavoring to intercept) a communication does not violate G.S. § 15A-287 where at least one party to the “communication” consents to the interception thereof. *See* G.S. § 15A-287; *see also* 18 U.S.C.A. § 2522(2)(d).

As to the defense of consent, Teresa Kroh first contends that *her own* consent to the interception of Thomas Kroh’s communications precludes his action under the Electronic Surveillance Act. However, this contention is wholly without merit as there is no evidence that Teresa Kroh was a “party” to any of the communications that were intercepted or that she endeavored to intercept. *See* G.S. § 15A-287(a).

Teresa Kroh also contends that she vicariously consented, on behalf of her minor children, to the interception of any oral communications between Thomas Kroh and her sons. While our courts have not addressed this issue, federal courts construing the Omnibus Act have considered and adopted the “vicarious consent doctrine.” *See Wagner v. Wagner*, 64 F. Supp. 2d 895 (D. Minn. 1999); *see also Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998); *Campbell v. Price*, 2 F. Supp. 2d 1186 (E.D. Ark. 1998); *Thompson v. Dulaney*, 838 F. Supp. 1535 (D. Utah 1993). As we find the reasoning of these cases persuasive, we adopt the vicarious consent doctrine with respect to our Electronic Surveillance Act, thereby permitting a custodial parent to vicariously

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consent to the recording of a minor child's conversations, as long as the parent:

has a good faith, objectively reasonable belief that the interception of [the] conversations is necessary for the best interests of the child[.]

Wagner, 64 F. Supp. 2d at 901; *see Pollock*, 154 F.3d at 610.

In this case, Teresa Kroh presented some evidence showing that she undertook the taping of her husband to protect her children. While this evidence is disputed, it nonetheless presents an issue of fact concerning her motivations in recording (or endeavoring to record) Thomas Kroh's conversations with her minor sons. We therefore conclude that the trial court erred in granting partial summary judgment to Thomas Kroh on his Electronic Surveillance Act claim. Accordingly, we reverse the order of summary judgment on this claim.

(II)

[2] We next consider the question of whether the trial court properly excluded veterinary reports that Teresa Kroh contends support her claims of bestiality against her husband. We answer: Yes, because she failed to properly authenticate the proffered reports.

N.C. Gen. Stat. § 8C-1, Rule 901 (2001) requires that an item of evidence be properly authenticated or identified prior to its admissibility. N.C. Gen. Stat. § 8C-1, Rule 1002 (2001) requires that, "[t]o prove the content of a writing, . . . the original writing . . . is required, except as otherwise provided in these rules or by statute." N.C. Gen. Stat. § 8C-1, Rule 1003 (2001) provides that a duplicate is admissible to the same extent as an original, unless there is a genuine question raised regarding the authenticity of the original. In the instant case, Thomas Kroh raised an issue at trial based on a lack of authentication of the records, thus requiring Teresa Kroh to show the authenticity of the alleged duplicate copies of the reports.

Moreover, N.C. Gen. Stat. § 8C-1, Rule 901(b)(1) (2001) provides that a witness with knowledge of a matter may testify "that a matter is what it is claimed to be." Nonetheless, every writing that is sought to be admitted, such as the veterinary reports in the instant case, (a) must be properly authenticated under Rule 901, (b) must satisfy the requirements of the "best evidence rule," Rule 1002, or an exception thereto, Rule 1003 *et seq.*, and (c) if offered for use as hearsay, the

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writing must conform to at least one of the hearsay rule exceptions established in N.C. Gen. Stat. § 8C-1, Rules 803 and 804 (2001).³ In this case, there was no evidence that either veterinarian, Dr. David Scotton or Dr. Mark Jackson, was “unavailable” as a witness as defined in Rule 804(a); thus, the hearsay reports Teresa Kroh sought to introduce must have fallen within one of the Rule 803 hearsay exceptions in order to have been admissible.

Nonetheless, Teresa Kroh argues that these reports were improperly excluded under the hearsay rule as they were offered, in part, to establish her *state of mind* at the time she made her allegations against Thomas Kroh, and thus were not technically hearsay under N.C. Gen. Stat. § 8C-1, Rule 801(c) (2001), as they were not offered to prove the truth of the matter asserted therein. She also argues that, even if the reports constituted hearsay, they were admissible under N.C. Gen. Stat. § 8C-1, Rule 803(3). However, the proffered veterinary reports do not contain statements by *Teresa Kroh* concerning her state of mind; Rule 803(3) only permits the introduction of statements of the *declarant's* then-existing state of mind. Since the proffered reports contained the notes of veterinarians, they were not relevant to *Teresa Kroh's* state of mind except to the extent that she read them and interpreted them. As she was offering these reports into evidence to prove their *contents* (and how she interpreted those contents, regardless of their actual truth or falsity), Teresa Kroh was required to produce the original reports (under Rule 1002) and properly authenticate them (under Rule 901). Since she failed to do so, these reports were properly excluded by the trial court.

Additionally, even though the reports were properly excluded as evidence, the trial court, in rendering its judgment following the bench trial, nonetheless stated that it had actually considered the alleged oral statements made by the veterinarians to Teresa Kroh, not as true, substantive evidence, but only to possibly explain and justify her actions. The trial court found that there was nothing in the reports, “admitted or not admitted, that would substantiate [Teresa Kroh's] claims” that Thomas Kroh had sex with the family dog, that the dog had been otherwise tampered with, or that whoever allegedly did so might also molest children. Accordingly, while we uphold the

3. Rule 803 provides certain exceptions to the hearsay rule irrespective of the hearsay declarant's availability as a witness, including, among others, an exception for a “statement of the declarant's then existing state of mind[.]” See N.C. Gen. Stat. § 8C-1, Rule 803(3). Rule 804 lists hearsay exceptions that apply only when the declarant is “unavailable” as a witness. See N.C. Gen. Stat. § 8C-1, Rule 804.

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exclusion of the reports, we further note that the reports were in fact considered by the trial court for the purpose desired by Teresa Kroh and thus, this assignment of error is wholly without any merit.

(III)

[3] Finally, we address the issue of whether the trial court erred in finding Teresa Kroh liable for slander *per se* for her statements to various individuals concerning her suspicions that her husband was having sex with the family dog and molesting her children. We answer: No, because the trial court's findings are supported by competent evidence and those findings in turn support the conclusions of law.

Appellate review of findings of fact "made by a trial judge, without a jury, is limited to . . . whether there is competent evidence to support the findings of fact." A trial court's conclusions of law, however, are reviewable *de novo* on appeal.

Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc., 143 N.C. App. 1, 9, 545 S.E.2d 745, 750 (internal citations omitted), *affirmed*, 354 N.C. 565, 556 S.E.2d 293 (2001).

The record on appeal in this case shows that Teresa Kroh's assignments of error on this issue state merely that the "trial court erred in its findings of fact and conclusions of law" and cite the trial court's entire judgment entered 28 December 2000, without directing this court's attention to any specific findings or conclusions made by the trial court. "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Therefore, we need only determine whether the trial court's findings of fact support its conclusions of law supporting liability for slander *per se*. See *Harris v. Walden*, 314 N.C. 284, 333 S.E.2d 254 (1985).

"False accusations of crime or offenses involving moral turpitude are actionable as slander *per se*." *Dobson v. Harris*, 352 N.C. 77, 79, 530 S.E.2d 829, 832 (2000). However, N.C. Gen. Stat. § 7B-301 (2001) imposes an affirmative duty upon anyone "who has cause to suspect" child abuse or neglect to report such conduct to the county Department of Social Services. Furthermore, N.C. Gen. Stat. § 7B-309 (2001) provides immunity from civil liability to those who report such conduct in accordance with G.S. § 7B-301, "provided that the person was acting in good faith." The reporter's "good faith" is to be pre-

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sumed “[i]n any proceeding involving liability[.]” *Id.* In other words, these statutes:

relieve[] the defendant of the burden of going forward with evidence of her good faith and impose[] upon the plaintiff the burden to go forward with evidence of the defendant’s bad faith or malice.

Dobson, 352 N.C. at 83, 530 S.E.2d at 835.

In this case, not only did Teresa Kroh allege that Thomas Kroh had molested her minor children, she also asserted that he had sex with the family dog. Assuredly, any such statements regarding the family dog would not be privileged under the plain language of G.S. § 7B-301 which concerns the abuse or neglect of children. Therefore, Teresa Kroh’s statements to Nancy Dowell, Richard Herrin, and additional statements in the presence of Steve Hollers concerning acts between Thomas Kroh and the family dog which the trial court found to constitute slander *per se*, see *Dobson*, were not protected by any qualified privilege under G.S. § 7B-309. Furthermore, statements to anyone other than persons with the county Department of Social Services concerning allegations that Thomas Kroh molested her minor sons would not be protected under G.S. § 7B-309’s provision of qualified immunity since that statute concerns reports to the county Department of Social Services.

Thus, the remaining question is whether the trial court properly found that Teresa Kroh’s statements to the Department of Social Services were made with actual malice, thereby negating any defense of privilege under G.S. § 7B-309. See N.C. Gen. Stat. § 1D-5 (2001) (defining malice as “a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant”); see also *Dobson*, 352 N.C. at 86, 530 S.E.2d at 837 (to overcome G.S. § 7B-309’s good-faith presumption, plaintiff must show defendant acted with actual malice). We conclude that the record on appeal supports the trial court’s determination that Teresa Kroh acted with actual malice, thus negating any qualified immunity she otherwise would have enjoyed under G.S. § 7B-309 for her statements to the Department of Social Services.

The trial court found as fact in its 28 December 2000 judgment that the audiotapes offered by Teresa Kroh “contained no evidence from which a reasonable person could conclude that sexual miscon-

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duct had occurred.” Both of Teresa Kroh’s minor sons testified that Thomas Kroh had not molested them in any way; both sons also testified that they had informed Teresa Kroh, when she inquired, that Thomas Kroh had not molested them in any way. The trial court found as fact that Thomas Kroh had not molested either of Teresa Kroh’s minor sons, and that Teresa Kroh knew those statements were false when she made them. The trial court found that Teresa Kroh made these statements “maliciously and with the intent to injure [p]laintiff.” Furthermore, the trial court conspicuously failed to find that Teresa Kroh’s testimony was credible, and found instead that Teresa Kroh’s conduct had been “cruel, wicked and with evil intent.” As Teresa Kroh did not except to these findings of fact, they are deemed binding on appeal. *See Koufman*.

The trial court thus concluded that Teresa Kroh’s statements “were made with the knowledge that they were false . . . [or] with [] reckless disregard for the[ir] truth or a high degree of awareness of the probability of [their] falsity.” Additionally, the trial court concluded that Thomas Kroh had proven by clear and convincing evidence that Teresa Kroh’s statements were made with malice as defined in G.S. § 1D-5.

Upon a careful review of the record and the evidence before the trial court, we conclude that the trial court’s factual findings support its conclusion that Teresa Kroh’s statements to the Department of Social Services were made with the knowledge that they were false or with reckless disregard as to their truth or falsity. The trial court’s findings that Teresa Kroh’s statements were made “maliciously and with the intent to injure” Thomas Kroh, and that Teresa Kroh’s conduct in the matter had been “cruel, wicked and [done] with evil intent,” support the trial court’s conclusion that Teresa Kroh’s statements were made with actual “malice” as defined in G.S. § 1D-5, thus depriving her of any alleged qualified immunity under G.S. § 7B-309. Accordingly, we affirm the trial court’s conclusion that Teresa Kroh was liable to Thomas Kroh for slander *per se* in connection with her statements made to the Department of Social Services, the State Bureau of Investigation, Nancy Dowell, Richard Herrin and Steve Hollers.

In summary, we reverse the trial court’s 7 January 2000 order granting Thomas Kroh partial summary judgment on his Electronic Surveillance Act claim, including the award of compensatory damages and attorneys’ fees therein as well as that portion of the trial court’s 28 December 2000 judgment awarding Thomas Kroh \$5,000.00

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in punitive damages pursuant to G.S. § 15A-286 for violation of the Electronic Surveillance Act. However, we affirm the trial court's exclusion of the veterinary reports proffered by Teresa Kroh at trial, and affirm the trial court's findings of fact and conclusions of law in its 28 December 2000 judgment, including its conclusion that Teresa Kroh acted with actual malice and therefore was not entitled to the "good faith" presumption under G.S. § 7B-309. In addition, we affirm the trial court's award of compensatory and punitive damages to Thomas Kroh on his slander *per se* claims.

Reversed and remanded in part; affirmed in part.

Judges HUNTER and THOMAS concur.

STATE OF NORTH CAROLINA v. EDWARD LAVONNE HORNSBY

No. COA01-1070

(Filed 20 August 2002)

1. Homicide— first degree murder—short-form indictment—constitutional

The short-form murder indictment is constitutional.

2. Homicide— first-degree murder—instruction on second-degree denied—no error

The trial court in a first-degree murder prosecution did not err by denying defendant's request to instruct the jury on second-degree murder as a lesser included offense where defendant asserted mental illness, but the State's evidence established every element of first-degree murder, including premeditation and deliberation, and there was no evidence to negate these elements.

3. Appeal and Error— preservation of issues—erroneous pattern jury instruction—no objection—standard of review—not plain error

A first-degree murder defendant preserved an alleged error in the insanity instruction for appellate review by traditional rather than plain error standards where the State requested that the jury be instructed in accordance with the pattern instructions and represented to the court and to defense counsel that the tendered instructions were in accordance with the pattern instructions.

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The acquiescence of defense counsel to the instructions satisfied the requirements of N.C.R. App. 10(b)(2).

4. Criminal Law— insanity instruction—burden of proof—no prejudicial error

There was no prejudicial error in a first-degree murder prosecution where the instruction on insanity tendered by the State and given by the trial court erroneously included “not” in the second sentence. Viewed contextually, the entire instruction placed the burden on the State to prove each element of the offense beyond a reasonable doubt and then upon the defendant to prove his insanity to the jury’s satisfaction, and the mandate clearly instructed the jury that it would return a verdict of not guilty if it had a reasonable doubt as to any element of the offense or if it was satisfied defendant was insane.

Appeal by defendant from judgment entered 9 January 2001 by Judge Knox V. Jenkins, Jr., in Harnett County Superior Court. Heard in the Court of Appeals 6 June 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General John G. Barnwell, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Benjamin Dowling-Sendor.

MARTIN, Judge.

Defendant, Edward Lavonne Hornsby, appeals from a judgment sentencing him to life imprisonment without parole entered upon his conviction by a jury of the first degree murder of Sharon Renee Moore. The State’s evidence at trial tended to show that defendant and Sharon Renee Moore lived together as husband and wife, though they were not married. On the morning of 21 March 2000, eleven-year-old Adam Barefoot, the “adopted” son of defendant and Moore, overheard defendant and Moore arguing, and heard Moore “saying something like, ‘Don’t be pointing no gun at me.’” Soon after, Barefoot went to school. When Barefoot returned home that afternoon, his aunt and uncle, Bobby and Laverne Berry, and their three sons were at his house. After the Berry family left, Barefoot again heard defendant and Moore arguing; he began working on his homework, a report on John F. Kennedy, and talked to defendant and Moore about the report. According to Barefoot, defendant stated, “ ‘Ain’t the person who killed him Lee Harvey Oswald?’ ” Barefoot

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responded by reading out loud from a book that Oswald had shot John F. Kennedy in the back of the head with a scoped rifle. Defendant then went into the bedroom, retrieved a rifle, and aimed it at Moore, who was sitting next to Barefoot on the couch in the living room. Defendant told Moore that she better leave before he killed her. Moore then got up, took Barefoot's hand, and stated, "Well, if I go, Adam's going with me." At that point, Barefoot said, "Renee goes, I'm going too[.]" Defendant then responded, "Everything's cool", placed the gun back in its case in the bedroom, and stated, "All right. Let's just watch some TV."

Later the same evening when a car went by, defendant said to Moore, "There goes your ride." Then Barefoot stated to defendant "Guess where your ride is[?]" and pointed toward defendant's legs. Defendant became angry and went into the bedroom and retrieved his gun. When he returned to the living room, defendant pointed the gun barrel at Moore's head. Moore attempted to knock the barrel away from her head with her right arm while she was holding Barefoot with her left arm. Defendant shot Moore in the head, then walked back into the bedroom and put the gun away. He returned to the living room, stepped over Moore, picked up the telephone, and called 911. During the 911 call, defendant stated that he "killed the devil" and referred to Moore's body as a dead snake. Meanwhile, Barefoot went next door and asked the neighbor to call the police. An autopsy report revealed that Moore's death was caused by a gunshot wound to the head from a range of 2 to 3 inches. At trial, Barefoot identified a scoped, high-powered rifle as the weapon defendant had used to shoot Moore.

Deputy Sheriff David Kinton was the first officer to arrive at the crime scene. He noticed that defendant had been smoking a marijuana joint but he did not detect the odor of alcohol on defendant's person. Defendant's house was searched pursuant to a search warrant and four firearms were seized, including the suspected murder weapon. Additionally, marijuana plants were seized from an outbuilding as well as two small bags of processed marijuana located in defendant's bedroom.

After having waived his *Miranda* rights, defendant answered questions asked by Harnett County Sheriff's Detective Joseph Webb. Defendant admitted to shooting and killing Moore. When asked why he shot Moore, defendant stated, "[b]ecause she was the devil in disguise and because she was going to leave me and wouldn't do what I wanted."

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There was also evidence that during the Berry family's visit for dinner on the evening Moore was killed, Laverne Berry, Moore's sister, helped Moore in the kitchen while defendant and Bobby Berry went over book work for their trucking business in the living room. While in the kitchen Laverne Berry and Moore discussed Moore's plan to leave defendant the next morning with Laverne's assistance. During dinner, defendant stated, "That will be your last supper, Renee. Your hear me, Renee? That's your last supper." Bobby Berry testified that he did not think the comment was unusual because defendant had previously told Moore that "they needed to get a lawyer and split things up 50, 50." Bobby Berry assumed defendant made the "last supper" comment because he wanted Moore to leave. Laverne Berry recalled that when defendant had been released from Dorothea Dix Hospital after a hospitalization in 1998, he stated that "he could commit murder and get by with it. He could plead insanity, and . . . he would spend about 2 years in prison and he could handle 2 years."

Barefoot testified that prior to 21 March 2000, defendant had injured his neck and two of his fingers. According to Barefoot, defendant had been "acting a little crazy." As an example, Barefoot recalled an occasion when defendant awakened him at 3:00 a.m., made him get dressed, and had him read the Bible. According to Barefoot, the night before the shooting occurred, defendant read the Bible over Moore while holding a fork.

Defendant gave pre-trial notice, pursuant to G.S. § 15A-959, of his intent to rely upon the defense of insanity and to offer expert testimony in support of the defense. At trial, defendant offered the testimony of Steven Buckliew concerning an incident which occurred at a job site during the summer of 1998, prior to defendant's earlier admission to Dorothea Dix Hospital. According to Mr. Buckliew, when he asked defendant how he was doing, defendant appeared to become upset and responded, "Get off the job site now. You're no Christian. The truth is not in you."

There was also evidence that defendant had been involuntarily committed to Dorothea Dix Hospital on 2 October 1998. He was treated with Haldol, an anti-psychotic medication, and Paxil, which is a medication for depression. Upon discharge on 14 October 1998, defendant was diagnosed with "manic depressive disorder, severe, with psychotic features." Defendant had a follow-up appointment at Harnett Mental Health Center in which he saw a clinical social worker who noted that defendant refused to take his prescribed medications,

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Haldol and Prozac. Subsequently, on 30 October 1998, defendant was again involuntarily committed, initially to Good Hope Hospital and then was transferred to Dorothea Dix Hospital. He was discharged on 3 November 1998 and was diagnosed upon discharge with "adjustment disorder with mixed disturbance of emotions and conduct, and other substance abuse[;] [p]ersonality disorder: [n]arcissistic and dependent traits."

Defendant offered the testimony of Dr. James Hilkey, a psychologist received by the trial court as an expert in forensic psychology. Dr. Hilkey testified that he based his opinions on interviews with defendant, conversations with defendant's sister and mother, psychological tests given to defendant, and psychological records from Dorothea Dix Hospital and other facilities. When Dr. Hilkey initially interviewed defendant, defendant was taking Effexor, an antidepressant medication, which Dr. Hilkey testified is commonly used to treat affective disorders such as bipolar disorders or mood swings. According to defendant, this medication helped him control his mood and thoughts.

Dr. Hilkey also reviewed assessments made by Dr. Peter Barboriak and Dr. Nicole Wolfe, both of whom are forensic psychiatrists at Dorothea Dix Hospital. During an admission on 30 March 2000 for evaluation of defendant's competency to proceed, Dr. Barboriak diagnosed defendant as suffering from psychotic disorder not otherwise specified; alcohol and cannabis dependence; and personality disorder with antisocial and paranoid traits. Dr. Wolfe subsequently conducted a psychiatric assessment of defendant's criminal responsibility at the time of the offense. She diagnosed defendant as having depressive disorder, not otherwise specified; probable cannabis induced psychotic disorder (marijuana use causing psychosis); cannabis dependence; and alcohol dependence. Dr. Wolfe further diagnosed defendant as having a personality disorder with antisocial and paranoid features. Dr. Hilkey testified that he agreed with Dr. Wolfe's diagnosis of personality disorder, but disagreed with her diagnosis of depressive disorder and cannabis induced psychotic disorder. Dr. Hilkey opined that defendant's psychiatric condition was not caused solely by his consumption of alcohol and marijuana. He testified that, in his opinion, at the time defendant shot Moore, he was suffering from a mental disease that impaired his ability to know right from wrong.

To rebut defendant's evidence of insanity, the State offered the testimony of Dr. Barboriak and Dr. Wolfe, both of whom were

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accepted as expert witnesses in the field of forensic psychiatry. Dr. Barboriak evaluated defendant at Dorothea Dix between 30 March 2000 and 12 April 2000 with respect to his capacity to proceed. When Dr. Barboriak first saw defendant, he seemed relatively comfortable and in control; as his hospitalization continued, however, he became more suspicious, angry, and hostile. Dr. Barboriak testified that defendant denied having any visual or audible hallucinations. However, defendant admitted to heavy use of alcohol and marijuana, and stated that he was under the influence of alcohol at the time he shot Moore. Defendant's urine drug screen was positive for cannabinoids, the breakdown products of marijuana. According to defendant, he had smoked a lot of marijuana just prior to the shooting and he had been smoking marijuana since he was 14 years old. Dr. Barboriak opined that defendant was competent to stand trial. He did not recommend that defendant be placed on any medication because he did not have a firm idea of what medication defendant needed. In fact, it puzzled Dr. Barboriak that defendant appeared to get better even when he was not taking medications.

Dr. Wolfe evaluated defendant between 15 December 2000 and 29 December 2000 to assess his mental condition with respect to his criminal responsibility at the time of the shooting. Dr. Wolfe testified, contrary to Dr. Hilkey's testimony, that the medication Effexor, which defendant was taking at the time Dr. Hilkey interviewed him, is not used to treat bipolar disorder but instead is an antidepressant used to treat depression and generalized anxiety disorders. While defendant was in Central Prison, he had been prescribed Effexor and had reported that it had been helpful to him and so Dr. Wolfe continued the prescription. Dr. Wolfe explained that she did not find one diagnosis that defendant clearly met and that is why she believed he had probable cannabis-induced psychotic disorder.

When asked about the defendant's use of the words "snake" and "devil" when referring to Moore during his conversation with the 911 operator, Dr. Wolfe noted that defendant had also stated to the operator, "You might not understand my lango [sic][.] That's just the way I talk you know." Dr. Wolfe testified that those words suggested to her that defendant knew he had shot a person and not a snake. Dr. Wolfe testified that, in her opinion, defendant was criminally responsible for his actions on 21 March 2000 in that "he was not so impaired in the psychiatric processes that he couldn't appreciate the difference between right and wrong at the time of the alleged offense."

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I.

[1] By nine assignments of error combined in one argument, defendant contends the “short-form” indictment for murder returned by the grand jury was inadequate to charge him with first degree murder under the United States Constitution and the Constitution of North Carolina. Defendant acknowledges that our Supreme Court has ruled against his position in holding that short-form indictments, authorized under G.S. § 15-144, are in compliance with both the North Carolina and United States Constitutions, *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000), and we overrule this assignment of error without discussion.

II.

[2] Defendant next argues that the trial court erred by denying his request to instruct the jury on second degree murder as a lesser included offense of first degree murder. Defendant asserts the evidence of defendant’s mental illness at the time of the shooting would have given the jury a reasonable basis for deciding that the State did not prove premeditation or deliberation beyond a reasonable doubt.

First degree murder is defined as “the intentional and unlawful killing of a human being with malice and with premeditation and deliberation.” *State v. Flowers*, 347 N.C. 1, 29, 489 S.E.2d 391, 407 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998). Murder in the second degree, on the other hand, is “the unlawful killing of a human being with malice but without premeditation and deliberation.” *Id.* The test for determining whether the trial court should have instructed the jury on second-degree murder is as follows:

The determinative factor is what the State’s evidence tends to prove. If the evidence is sufficient to fully satisfy the State’s burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant’s denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

State v. Strickland, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). “Premeditation means that the act was thought

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out beforehand for some length of time, however short” *State v. Bullock*, 326 N.C. 253, 257, 388 S.E.2d 81, 83 (1990). Deliberation means that the fatal act was “executed with a fixed design to kill notwithstanding defendant was angry or in an emotional state at the time.” *State v. Ruof*, 296 N.C. 623, 636, 252 S.E.2d 720, 728 (1979). Circumstances that are illustrative of the existence of premeditation and deliberation include:

- (1) absence of provocation on the part of the deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim’s wounds.

State v. Olson, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992).

The evidence in the present case showed: defendant pointed a gun at Moore on the morning of 21 March 2000; he again threatened Moore that evening at supper by stating, “That will be your last supper, Renee;” he pointed his rifle at Moore shortly before shooting her; and he fired the fatal shot at point blank range. There was also evidence of the existence of ill will between defendant and Moore, as shown by their arguing at various times on the day of the killing and by Moore’s plan to leave defendant. After he killed Moore, defendant stated that he shot her “[b]ecause she was the devil in disguise and because she was going to leave me and wouldn’t do what I wanted.” Moreover, there was no evidence of provocation on Moore’s part. The State’s evidence established each and every element of first degree murder, including premeditation and deliberation, and there was no evidence to negate these elements. Accordingly, the trial court correctly refused to submit the issue of defendant’s guilt of second degree murder as a lesser included offense and defendant’s assignment of error to the contrary is overruled.

III.

[3] Defendant also assigns error to the trial court’s instructions to the jury with respect to the defense of insanity and contends the error entitles him to a new trial. We must first consider the applicable standard of appellate review of his contentions. The State argues that our standard of review with respect to this assignment of error is lim-

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ited to plain error review. The State's contention arises upon the failure of defendant's counsel to object after having reviewed a copy of the written instructions proposed by the State, which contained the error about which defendant complains, and his failure to object after the trial court had completed the instructions. *See* N.C.R. App. P. 10(b)(2).

The record discloses that during the conference on instructions, the prosecutor handed to the court "the instructions for the insanity defense under [pattern jury instruction] 304.10." Defendant's counsel stated, "I have read that . . . [I]t appears to be in accordance with the pattern, Your Honor. So, we're satisfied with that . . ." After the court completed its instructions to the jury, the court inquired of both the State and the defendant as to whether there were any requests for corrections or additions to the charge. Defendant's counsel responded, "[t]he defendant's satisfied with it, Your Honor." In fact, both the written request tendered by the prosecutor and the instruction read to the jury by the trial court contained an error, as will be hereinafter discussed.

We believe, following the reasoning of our Supreme Court in *State v. Keel*, 333 N.C. 52, 423 S.E.2d 458 (1992), defendant has preserved the issue for appellate review under traditional standards of review rather than a plain error standard. Because the State requested that the jury be instructed in accordance with the pattern instructions relating to first degree murder and the defense of insanity, and represented to the trial court and to defense counsel that the instructions which it tendered were, in fact, in accordance with the pattern instructions, the acquiescence of defense counsel to the instructions satisfied the requirements of Rule 10(b)(2) and preserved the question for review on appeal. *See Keel, supra*.

[4] In North Carolina, insanity is an affirmative defense to a criminal charge which excuses a defendant from criminal responsibility for an act which would otherwise be punishable as a crime. The test for insanity, as a criminal defense, is

whether the defendant was laboring under such a defect of reason from disease or deficiency of mind at the time of the alleged act as to be incapable of knowing the nature and quality of his act or, if he did know this, was incapable of distinguishing between right and wrong in relation to such act.

State v. Evangelista, 319 N.C. 152, 161, 353 S.E.2d 375, 382 (1987) (citations omitted). The defense is unrelated to the existence or

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nonexistence of the elements of the criminal act; thus, where a defendant raises the defense of insanity, the burden remains upon the State, as in every criminal prosecution, to prove the defendant's guilt by proving the existence of each element of the offense beyond a reasonable doubt. *State v. Marley*, 321 N.C. 415, 364 S.E.2d 133 (1988). If the State carries that burden, the burden shifts to the defendant to show, to the jury's satisfaction, his insanity. *Id.*; *Evangelista, supra*.

In accordance with the State's request, the trial court read to the jury instructions with respect to the defense of insanity as follows:

When there's evidence which tends to show that the defendant was legally insane at the time of the alleged offense, you will consider this evidence only if you find that the state has proved beyond a reasonable doubt each of the things about which I've already instructed you. Even if the state does **not** prove each of these things beyond a reasonable doubt, the defendant would nevertheless be not guilty if he was legally insane at the time of the offense (emphasis added).

The first sentence of the instruction given is identical to N.C.P.I.—Crim. 304.10. However, the second sentence of the instruction as read to the jury, and quoted above, erroneously included the word "**not**"; the instruction should have read:

Even if the State does prove each of these things beyond a reasonable doubt, the defendant would nevertheless be not guilty if he was legally insane at the time of the alleged offense.

N.C.P.I.—Crim. 304.10. The defendant asserts the instructional error had the effect of instructing the jury that the insanity defense would apply only if (1) the State failed to prove each element of first-degree murder beyond a reasonable doubt and (2) the defendant proved the insanity defense to the satisfaction of the jury. The State concedes the instructional error but argues the error does not entitle defendant to a new trial because the instructions, construed contextually and as a whole, were correct.

It is well established that "the trial court's charge to the jury must be construed contextually and isolated portions of it will not be held prejudicial error when the charge as a whole is correct." *State v. Boykin*, 310 N.C. 118, 125, 310 S.E.2d 315, 319 (1984). While it is true that conflicting statements of law on a material point in the jury charge require a new trial, *State v. Schultz*, 294 N.C. 281, 240 S.E.2d

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451 (1978), our courts have consistently held that where the charge as a whole presents the law fairly and clearly to the jury, isolated expressions standing alone, though erroneous, do not require reversal. *State v. Jones*, 294 N.C. 642, 243 S.E.2d 118 (1978). Such isolated portions may not be “detached from the charge as a whole and critically examined for an interpretation from which prejudice to defendant may be inferred.” *Id.* at 653, 243 S.E.2d at 125 (citations omitted). We believe it is so in this case.

Applying these principles to the present case, we believe that, notwithstanding the instructional error, the entire charge viewed contextually correctly placed the burden upon the State to prove each element of the offense beyond a reasonable doubt and, in such event, the burden upon the defendant to prove his insanity to the jury’s satisfaction. In its instructions, the trial court repeatedly informed the jurors of the State’s burden of proving the defendant’s guilt beyond a reasonable doubt. In addition, the trial court instructed the jury that it would consider the evidence of insanity only if the State proved each of the elements of first degree murder beyond a reasonable doubt, and that

unlike the state, which must prove all other elements of the crime beyond a reasonable doubt, the defendant must only prove this insanity to your satisfaction . . .

And, in its final mandate to the jury, the trial court clearly informed the jury that it should return a verdict of guilty of first degree murder if it found from the evidence beyond a reasonable doubt the existence of each of the elements of that offense, unless it was satisfied that defendant was insane at the time of the act. The mandate clearly instructed the jury that it would return a verdict of not guilty if it had a reasonable doubt as to any element of the offense or if it was satisfied defendant was insane. We hold that the trial court’s instructions clearly informed the jury (1) the State’s burden to prove defendant’s guilt of each essential element of the offense of first degree murder; (2) only if the State met that burden was the jury to consider the insanity defense, and (3) defendant’s burden to prove such defense to the jury’s satisfaction. Therefore, we do not believe there is a reasonable possibility that a different result would have been reached had the trial court not committed the instructional error, G.S. § 15A-1443(a), and defendant’s assignment of error is overruled.

Defendant received a fair trial, free from prejudicial error.

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No prejudicial error.

Judges TIMMONS-GOODSON and CAMPBELL concur.



BRENDA JOYCE HOLLEY, EMPLOYEE, PLAINTIFF-APPELLEE v. ACTS, INC., EMPLOYER,
LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANT-APPELLANTS

No. COA01-931

(Filed 20 August 2002)

1. Workers' Compensation— findings—partially unsupported—no prejudicial error

There was competent evidence in a workers' compensation action to support an Industrial Commission finding about the circumstances of the injury where a specific sentence was not supported by the evidence, but there was competent evidence in the record to support the remainder of the finding and both parties stipulated to a statement of how the injury occurred.

2. Workers' Compensation— causation—"could" and "might" testimony

The Industrial Commission's finding in a workers' compensation action that plaintiff's deep venous thrombosis (DVT) was a result of an accident at work was supported by competent evidence and was not speculative even though it was couched in "coulds" and "mights." "Could" or "might" expert testimony is insufficient to support causation only when there is additional evidence showing the opinion to be speculation.

3. Workers' Compensation— deep venous thrombosis—compensation

An Industrial Commission opinion awarding benefits for permanent injury to an internal organ under N.C.G.S. § 97-31(24) for plaintiff's deep venous thrombosis was remanded for consideration of whether plaintiff's injury was a scheduled injury under N.C.G.S. § 97-31(15) for loss of use of her leg because an award under subsection (24) is permitted only if no compensation is payable under any other subsection of N.C.G.S. § 97-31.

Judge TYSON concurring in part, dissenting in part.

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Appeal by defendants from opinion and award entered 26 February 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 May 2002.

Griffin, Smith, Caldwell, Helder & Lee, P.A., by Annika M. Brock and R. Kenneth Helms, Jr., for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Neil P. Andrews and Terry L. Wallace, for defendant-appellants.

McGEE, Judge.

ACTS, Inc. (defendant-employer) and its insurance carrier Liberty Mutual Insurance Company (collectively defendants) appeal from the opinion and award of the North Carolina Industrial Commission (Industrial Commission) awarding workers' compensation benefits to Brenda Joyce Holley (plaintiff). Plaintiff was hired by defendant-employer in January 1996 to work at Plantation Estates, a medical care facility, as a Certified Nurses Assistant I.

Plaintiff was at Plantation Estates on 13 July 1996 when she saw a patient on the floor. As plaintiff walked down the hall to help lift the patient off the floor, plaintiff's foot became stuck on the carpet. She turned suddenly and injured her lower left leg in the calf. Plaintiff testified she "could hardly walk" and her left leg was in pain. Plaintiff returned to work on 14 July 1996. The pain in her leg continued to worsen and she noticed some swelling. She was examined by Dr. Jason Ratterree (Dr. Ratterree) at Presbyterian Hospital Matthews. Dr. Ratterree diagnosed plaintiff as suffering from muscle strain. He prescribed medication, told plaintiff to wear an ace bandage and use crutches, and ordered plaintiff to stay off her left leg for three days.

Plaintiff returned to work on 22 July 1996 and continued to work for defendant-employer. On 3 September 1996, plaintiff went to the doctor, and while at the doctor's office she experienced acute pain and swelling in her left lower leg and had to be hospitalized for three days. While at the hospital, plaintiff was diagnosed with deep venous thrombosis (DVT), which is a disorder involving a thrombus or blood clot in one of the deep veins of the body, causing an obstruction of the blood flow and often resulting in the pooling of blood in a lower extremity. Plaintiff saw Dr. Dietlinde W. Zipkin (Dr. Zipkin) and plaintiff returned to work on 16 November 1996. Plaintiff continued to experience leg pain and was hospitalized again on 16 June 1997 for chronic DVT.

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Plaintiff's claim was heard before a deputy commissioner on 22 March 2000. The deputy commissioner filed an opinion and award concluding that "plaintiff's DVT was not the result of the plaintiff's injury by accident to her left leg arising out of and in the course of her employment." Plaintiff appealed to the Industrial Commission.

The Industrial Commission heard the matter on 24 January 2001 and issued an opinion and award concluding that "plaintiff's DVT was the result of the plaintiff's injury by accident to her left leg arising out of and in the course of her employment." The Industrial Commission ordered defendants to pay to plaintiff \$20,000.00 plus interest pursuant to N.C. Gen. Stat. § 97-31(24), and seventeen and one-seventh weeks of temporary total disability at the rate of \$162.40 per week plus interest. The Industrial Commission also ordered defendants to pay plaintiff's attorneys twenty-five percent of the compensation due plaintiff and to pay plaintiff's medical expenses and expert witness fees. Commissioner Laura Kranifeld Mavretic issued a dissenting opinion. Defendants appeal from the Industrial Commission's opinion and award.

On an appeal from an opinion and award of the Industrial Commission, the standard of review for this Court "is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). The Industrial Commission's findings of fact are binding on review if the record contains any competent evidence in their support. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). This is true even when the record offers evidence that would support findings to the contrary. *Id.* The Industrial Commission's conclusions of law, however, are reviewable *de novo*. *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 149, 468 S.E.2d 269, 274 (1996).

I.

[1] Defendants first argue that the Industrial Commission erred in describing the circumstances surrounding plaintiff's alleged injury by accident.

The parties entered into stipulations at the hearing before the deputy commissioner which the Industrial Commission incorporated as findings of fact and conclusions of law in its opinion and award.

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Stipulation number five states that “[t]he parties stipulated that the plaintiff injured her left lower leg in the calf area when she turned suddenly while walking down the hall at her place of employment with the defendant-employer on July 13, 1996.”

The opinion and award additionally stated in finding number four that

[o]n July 13, 1996, the plaintiff was working for the defendant-employer as a floater. The plaintiff was assigned to help lift a patient off of the floor. As the plaintiff helped to lift the patient, the plaintiff’s foot became stuck on the carpet as she turned suddenly and she injured her lower left leg in the calf. . . . The foot becoming stuck on the carpet as she turned suddenly constituted an accident and the resulting injury was an injury by accident within the meaning of the Workers’ Compensation Act.

The Industrial Commission concluded in conclusion of law number one that “[o]n July 13, 1996, the plaintiff sustained an injury by accident to her left leg arising out of and in the course of her employment with defendant-employer.”

Defendants argue on appeal that the sentence in finding of fact number four that “as the Plaintiff helped to lift the patient, Plaintiff’s foot became stuck on the carpet as she turned suddenly[,]” is not supported by competent evidence in the record. They contend that “at the very least, [the opinion and award] should be modified to the extent it is necessary for a decision in this case.”

At the hearing before the deputy commissioner, plaintiff testified as follows:

Q: Do you remember on July 13, 1996?

A: Yes, I do.

Q: Why do you remember that, Ms. Holley?

A: I was working there, and I was on the special care unit, which is the Alzheimer[‘s] unit. I had [gone] over to go to the bathroom, and Jan Waggey, the nurse there, asked me to go down and check with Ms. Bowman. She couldn’t understand—which was a patient that—I was a floater. I floated from both sides. Asked me if I would check and see what she was saying. She couldn’t understand her. At that time, I went down and talked with Mrs. Bowles. And as I was coming back up the hall to

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report to Ms. Waggey what she had said, I [saw] a patient on the floor

Q: What do you mean “on the floor”?

A: She had fallen. We’re not to remove a patient [] unless we get the nurse. So Peggy Lee was a CNA, and Jan—we went down and picked her up. But as I hurried up the hall, I turned to go back; and, when I did, it was like my foot stuck to the carpet. They had [] new carpet put down; and, when I swerved around, I felt a pull in my leg, and I told Peggy when we got to the room—I said, “I have pulled my leg.”

Q: Can you tell us specifically where in your leg?

A: In the calf of my leg.

Q: Which leg?

A: Left leg.

Q: All right. At that point, what did you do?

A: Helped get the patient up off the floor, and then I went back to special care. At that time, I could hardly walk. My leg was hurting[.]

The specific sentence defendants are challenging on appeal is not supported by competent evidence in the record. However, even if we set aside this sentence, there remains competent evidence in the record to support the remainder of finding of fact number four; namely, that plaintiff’s foot became stuck on the carpet as she turned suddenly, which was an accident and the resulting injury was an injury by accident. Further, we note that both parties stipulated, and the Industrial Commission additionally found as fact that plaintiff “injured her left lower leg in the calf area *when she turned suddenly while walking down the hall at her place of employment*[.]” (emphasis added). This stipulation as incorporated in the opinion and award is fully supported by plaintiff’s testimony and this stipulation supports conclusion of law number one. Defendants do not dispute that plaintiff’s injury by accident arose out of and in the course of her employment with employer-defendant. Defendants’ assignments of error as to this issue are overruled.

II.

[2] Defendants next argue that the Industrial Commission erred in finding and concluding that plaintiff’s injury by accident caused her

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DVT because the medical evidence in this case is insufficient to establish a causal link between plaintiff's injury and her DVT.

To establish "a compensable claim for workers' compensation, there must be proof of a causal relationship between the injury and the employment." *Peagler v. Tyson Foods*, 138 N.C. App. 593, 597, 532 S.E.2d 207, 210 (2000) (citing *Booker v. Medical Center*, 297 N.C. 458, 475, 256 S.E.2d 189, 200 (1979)). An injury is therefore compensable if " 'it is fairly traceable to the employment' or 'any reasonable relationship to the employment exists.' " *Rivera v. Trapp*, 135 N.C. App. 296, 301, 519 S.E.2d 777, 780 (1999) (quoting *Shaw v. Smith and Jennings, Inc.*, 130 N.C. App. 442, 445, 503 S.E.2d 113, 116, *disc. review denied*, 349 N.C. 363, 525 S.E.2d 175 (1998)). The plaintiff has the burden of proving each element of compensability. *Harvey v. Raleigh Police Dept.*, 96 N.C. App. 28, 35, 384 S.E.2d 549, 553, *disc. review denied*, 325 N.C. 706, 388 S.E.2d 454 (1989).

In cases " 'where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, *only an expert can give competent opinion evidence as to the cause of the injury.*' " *Id.* at 34, 384 S.E.2d at 552 (quoting *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980)). "However, when such expert opinion testimony is based merely upon speculation and conjecture, it can be of no more value than that of a layman's opinion." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000).

The "expert testimony need not show that the work incident caused the injury to a 'reasonable degree of medical certainty.'" *Peagler*, 138 N.C. App. at 599, 532 S.E.2d at 211 (citation omitted). "Rather, the competent evidence must provide 'some evidence that the accident at least might have or could have produced the particular disability in question.' " *Id.*, (quoting *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 28, 514 S.E.2d 517, 522 (1999)). Our Courts have "allowed 'could' or 'might' expert testimony as probative and competent evidence to prove causation." *Young*, 353 N.C. at 233, 538 S.E.2d at 916. However, " 'could' or 'might' expert testimony [is] insufficient to support a causal connection when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation." *Id.* (citing *Maharias v. Weathers Bros. Moving & Storage Co.*, 257 N.C. 767, 767-68, 127 S.E.2d 548, 549 (1962)).

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In the case before us, Dr. Ratterree testified as an expert in emergency medicine and general medicine. Dr. Ratterree examined plaintiff on 14 July 1996, the day following her accident at work. In his deposition, the following exchange took place:

Q: Dr. Ratterree, based upon your examination and the history related to you by [plaintiff], could the DVT that you found have been caused by the incident that she related to you, that is, the turning?

A: It's possible.

...

Q: And I think you had indicated that there was a possibility, in your opinion, that [plaintiff] suffered from DVT. What symptoms specifically was it in your examination that you felt indicated DVT?

A: Anytime somebody has had some injury as she had and has some tenderness on exam, you know, tenderness on the posterior calf as she did, the possibility is there, but the problem is that it's not one of those things that develops over a period of hours or minutes. . . .

...

Q: . . . Can you say to a reasonable degree of medical certainty or a reasonable degree of medical probability that the incident related to you by [plaintiff] was a significant contributing factor in causing DVT?

A: I can't say that, no.

Q: It's just that it's a possibility?

A: It's a possibility. It's a possibility.

Q: Is it a reasonable possibility?

A: It's reasonable. . . .

Dr. Zipkin also testified as an expert witness in the field of internal medicine and general medicine. Dr. Zipkin treated plaintiff after her DVT was diagnosed and testified as follows:

Q: [D]o you have an opinion satisfactory to yourself and to a reasonable degree of medical certainty as to whether the accident described in the reports from Presbyterian Hospital and

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from Dr. Kaldy on July 13, 1996 could or might have caused the DVT?

...

A: I don't know if it caused the DVT or not.

Q: Do you have an opinion whether it could or might have caused it?

A: It could have caused it or it could have happened despite it.

...

Q: [I]f the evidence shows that [plaintiff] was walking down a hall and she quickly turned and experienced pain in her left calf, and at that point obtained medical treatment and a DVT was present—if the evidence should show that all that is true, do you have an opinion satisfactory to yourself whether or not that event could or might have caused the DVT?

...

A: We have nothing showing that DVT was present at the time of her injury, so isn't this kind of a moot point?

Q: My question is, though, could those events that I just described, could or might that have caused the DVT to form?

A: It's possible that that scenario of [plaintiff's] injury could have caused a DVT to form, but I don't know that it did.

Defendants argue that this evidence is insufficient to establish a causal link between plaintiff's injury by accident and her diagnosis of DVT because the medical testimony was "couched in terms of 'coulds' and 'mights' which was speculative in nature and not competent evidence of causation." We disagree. In this case, there is sufficient evidence that the accident might have or could have caused plaintiff's DVT. Although DVT can arise from several different causes, "[a]ll that is necessary is that [the] expert express an opinion that a *particular* cause was *capable* of producing the injurious result." *Buck v. Procter & Gamble, Co.*, 52 N.C. App. 88, 95, 278 S.E.2d 268, 273 (1981). Both doctors testified as to the multiple causes of DVT, but both also testified that plaintiff's DVT could have been caused by her accident on 13 July 1996.

The Industrial Commission's finding of fact that plaintiff's accident on 13 July 1996 caused her DVT is supported by competent

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evidence in the record and is not based on mere speculation or conjecture. Further, the Industrial Commission did not err in concluding that plaintiff's DVT was a result of her 13 July 1996 accident. Defendants' assignments of error as to this issue are overruled.

III.

[3] Finally, defendants contend the Industrial Commission erred in awarding plaintiff benefits under N.C. Gen. Stat. § 97-31(24). The Industrial Commission found as fact and concluded as a matter of law that "[d]amage to the innermost layer of the vein constitutes permanent injury to an internal organ or part of the body for which no compensation is payable under any other subdivision of N.C. Gen. Stat. § 97-31(24)." The Industrial Commission awarded plaintiff the full amount of compensation allowed in N.C. Gen. Stat. § 97-31(24).

N.C. Gen. Stat. § 97-31(24) (1999) states that

[i]n case of the loss of or permanent injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section, the Industrial Commission may award proper and equitable compensation not to exceed twenty thousand dollars (\$20,000).

"By employing the word 'may' in N.C.G.S. § 97-31(24) the legislature intended to give the Industrial Commission discretion whether to award compensation under that section." *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986). Thus, the Industrial Commission has discretion as to whether an award under N.C. Gen. Stat. § 97-31(24) is warranted, and its decision will not be overturned on appeal unless it "is manifestly unsupported by reason," or "so arbitrary that it could not have been the result of a reasoned decision." *Id.* (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) and *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985)).

Defendants argue that because plaintiff was entitled to compensation under N.C. Gen. Stat. § 97-31(15), which provides an employee compensation for the loss of the use of her leg, the Industrial Commission abused its discretion in awarding her benefits under N.C. Gen. Stat. § 97-31(24). The language of N.C. Gen. Stat. § 97-31(24) is clear that an award under this subsection, although discretionary, is only permitted if "no compensation is payable under any other subdivision" of N.C. Gen. Stat. § 97-31 as a scheduled injury. It is not clear from the record if the Industrial Commission considered whether an

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award to plaintiff under N.C. Gen. Stat. § 97-31(15) for loss of the use of her leg was not proper before it determined that an award under G.S. § 97-31(24) was appropriate; we therefore cannot determine whether the Industrial Commission abused its discretion in its award to plaintiff under N.C. Gen. Stat. § 97-31(24). We remand this case to the Industrial Commission in order that it first consider whether plaintiff's injury is a scheduled injury under N.C.G.S. § 97-31(15) before considering whether an award to plaintiff is appropriate pursuant to N.C. Gen. Stat. § 97-31(24).

Remanded.

Chief Judge EAGLES concurs.

Judge TYSON concurs in part and dissents in part with a separate opinion.

TYSON, Judge, concurring in part, dissenting in part.

I concur in parts I and III of the majority's opinion. I respectfully dissent from part II. Plaintiff failed to introduce competent evidence to establish a causal relationship between the compensable injury by accident and the ensuing deep venous thrombosis (DVT). The expert testimony was mere speculation and possibility, and failed to establish the required causal connection.

Plaintiff must produce competent evidence establishing a causal relationship between the injury and the employment. *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 597, 532 S.E.2d 207, 210 (2000). Testimony of an expert that is merely speculative or that raises no more than a mere possibility is not admissible as to the issue of causal relationship. *Lockwood v. McCaskill*, 262 N.C. 663, 669, 138 S.E.2d 541, 545-46 (1964); *see also Ballenger v. Burris Indus., Inc.*, 66 N.C. App. 556, 567, 311 S.E.2d 881, 887 (1984) (stating that an expert is not competent to testify regarding causal relation based on mere speculation or possibility). "Could" or "might" refers to probability and not mere possibility. *See Lockwood*, 262 N.C. at 668, 138 S.E.2d at 545. Here, both experts testified only as to possibility and not probability.

Our Supreme Court has previously "allowed 'could' or 'might' expert testimony as probative and competent evidence to prove causation." *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 233, 538 S.E.2d 912, 916 (2000) (citations omitted). However, "'could' or

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'might' expert testimony [is] insufficient to support a causal connection when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation." *Id.* (citing *Maharias v. Weathers Bros. Moving & Storage Co.*, 257 N.C. 767, 767-68, 127 S.E.2d 548, 549 (1962)). Here, additional testimony shows the experts' opinions to be mere guess and speculation.

In addition to the testimony cited by the majority, Dr. Ratterree also testified in response to a question of whether he had an opinion "as to whether the twisting injury on July 13, 1996 could or might have been a significant contributing factor to deep venous thrombosis," that "[i]n my opinion it *probably is not*, but I cannot say, you know, beyond a shadow of a doubt. . . ." and

[i]n my opinion it *would be unlikely* . . . I cannot say that she had turned and this had been brewing even before that, because a lot of DVTs are totally asymptomatic for a long time . . . I know these clots take time to develop, so I can't say that she wasn't brewing something even before then. *It's just a galaxy of possibilities.*

(Emphasis supplied).

The expert medical testimony does not show a causal relationship between the injury by accident and the DVT. *See Harvey v. Raleigh Police Dept.*, 96 N.C. App. 28, 35, 384 S.E.2d 549, 553, *disc. review denied*, 325 N.C. 706, 388 S.E.2d 454 (1989) (plaintiff has the burden of proving each element of compensability). There is no competent evidence to support the Industrial Commission's finding and conclusion that plaintiff's DVT was causally related to her twisting injury. I would reverse the Opinion and Award of the Commission. I respectfully dissent.

MARCIA C. MEEKINS, PLAINTIFF V. KIM M. BOX, DEFENDANT

No. COA01-627

(Filed 20 August 2002)

1. Trusts—resulting—remedy not requested—notice

The trial court did not err by finding that plaintiff was entitled to a resulting trust on defendant's interest in the pertinent property even though plaintiff did not specifically request this remedy in her original complaint, because the evidence was sufficient to

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support the trial court's finding that the pleadings, the motion to amend, and the evidence gave notice to defendant that a resulting trust was a possible remedy, including evidence that: (1) plaintiff testified that the money for the down payment for the house came from gifts from her family and from the sale of stock that plaintiff had inherited from her family; (2) plaintiff further testified that defendant did not contribute any amount to the down payment; and (3) plaintiff testified that both she and defendant intended that the house be titled solely in plaintiff's name so that plaintiff could qualify for aid in closing costs from her employer.

2. Trusts—resulting—burden of proof

Although defendant contends the trial court erred by failing to state in its judgment what burden of proof it used in its decision granting a resulting trust on defendant's interest in the pertinent property, the trial court was not required to do so because: (1) there is no statutory or general requirement that the trial court state in its judgment the burden of proof it used; and (2) no presumption of a gift applied.

3. Fraud—credit cards—findings of fact—intentionally deceptive conduct

The trial court's findings of fact supported its conclusion that plaintiff was entitled to damages for fraud based on defendant's actions of acquiring credit cards in plaintiff's name without plaintiff's knowledge, falsely assuring plaintiff that defendant was also liable on the cards, and incurring significant charges in plaintiff's name on the credit cards, because: (1) in addition to concealment of material facts, the trial court's findings establish that defendant's actions were repeated and deliberate, and that defendant's continued pattern of deceit included making false statements to plaintiff, to creditors, to the court, and to law enforcement officers; and (2) even though the findings do not include a specific finding that defendant acted with intent to deceive, there is no other reading of the findings but to find intentionally deceptive conduct.

4. Unjust Enrichment—failure to provide evidence of value of improvements

The trial court did not err by concluding as a matter of law that defendant failed to establish her counterclaim for unjust enrichment, because neither defendant's testimony nor the testimony of her father provided evidence of the value of the improve-

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ments to the pertinent property, which is a necessary element to recover for unjust enrichment beyond nominal damages.

Appeal by defendant from a judgment entered 26 September 2000 by Judge V. Bradford Long in Moore County District Court. Heard in the Court of Appeals 25 March 2002.

Robbins, May, & Rich, L.L.P., by P. Wayne Robbins, for the plaintiff-appellee.

Rich Costanza, for the defendant-appellant.

HUDSON, Judge.

Defendant appeals a judgment which: (1) orders that a resulting trust in favor of the plaintiff be issued upon defendant's interest in real property held by the parties; (2) awards damages against her for fraud; and (3) denies her counter-claim for unjust enrichment. We affirm.

The evidence presented at trial tended to show the following: prior to the lawsuit, the parties had been in a romantic relationship for approximately six years, from 1993 to 1999. They lived together during the relationship, moving from state to state to meet the demands of plaintiff's employment. In October 1997, the parties moved to North Carolina. Throughout the course of the relationship, plaintiff remained steadily employed, first with Meisner Marine Construction and then with the Army Corps of Engineers. Defendant held jobs sporadically, if at all. The parties held a joint bank account into which plaintiff deposited her salary.

Plaintiff testified that during the parties' relationship, the defendant handled all of their finances. In 1995, plaintiff gave defendant an unlimited power of attorney so that the defendant would be able to handle arrangements for renting plaintiff's house in Jacksonville, Florida. At some point, plaintiff also granted a half interest in the house in Florida to defendant. Defendant applied for credit cards and told plaintiff that the cards were joint accounts. Plaintiff later found that defendant had not listed herself as jointly liable for payment, but that defendant did list herself as authorized to use the accounts. Defendant simply signed plaintiff's name on the credit card, rather than applying as attorney-in-fact.

In the summer of 1998, the parties decided to purchase a house in Whispering Pines, North Carolina. At defendant's suggestion, plaintiff

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agreed to purchase the house solely in plaintiff's name, so that plaintiff's employer would reimburse her for closing costs. At the closing, which was arranged by defendant, plaintiff simply signed the papers but did not read them. Plaintiff did not realize until later that, contrary to her agreement with defendant, the deed to the house was issued in both of their names. The deed of trust to the mortgage, however, carried only plaintiff's name, making her solely liable for payments on the house. The plaintiff funded all of the down payment with cash gifts from her family, and by selling stock that she inherited from her family. Defendant did not contribute to the down payment or closing costs.

By March of 1999, plaintiff and defendant were having difficulties in their relationship. At around that time, plaintiff discovered that both names were on the deed to the house. Plaintiff moved out for a time, then moved back in when defendant promised her that she was leaving. When defendant did not leave, plaintiff moved out again on 24 April 1999.

On 22 July 1999, plaintiff filed this action alleging in her complaint that the deed to the house had been issued in both parties' names by mistake, that defendant had obtained credit cards and incurred numerous charges on them using plaintiff's name without permission, and requesting that the court reform the deed and award her damages for the unauthorized charges. On 27 September 1999, the defendant answered, denying the allegations of plaintiff's complaint, raising various affirmative defenses and asserting a counterclaim against plaintiff for unjust enrichment, alleging that if plaintiff were given sole ownership of the house, she would be unjustly enriched by defendant's contributions and improvements to the property. The court heard the case without a jury in May 2000, and on 14 August 2000, plaintiff moved to amend her complaint to request the remedy of a resulting trust. On 25 September 2000, the Honorable V. Bradford Long entered a judgment granting plaintiff a resulting trust on defendant's interest in the property, granting plaintiff damages for fraud and denying defendant's counterclaim for unjust enrichment. Defendant appeals.

[1] Defendant argues that the trial court erred in finding that the plaintiff was entitled to a resulting trust when the plaintiff did not specifically request this remedy in her original complaint. "A resulting trust arises 'when a person becomes invested with the title to real property under circumstances which in equity obligate him to hold the title and to exercise his ownership for the benefit of

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another’” *Mims v. Mims*, 305 N.C. 41, 46, 286 S.E.2d 779, 783 (1982) (quoting *Teachey v. Gurley*, 214 N.C. 288, 292, 199 S.E. 83, 86-87 (1938)). For example, if one person provides the consideration for a purchase of land, but title to the land is taken in the name of another, a resulting trust arises in favor of the former. *See id.* “In such a situation . . . a resulting trust commensurate with his interest arises in favor of the one furnishing the consideration.” *Cline v. Cline*, 297 N.C. 336, 344, 255 S.E.2d 399, 404-05 (1979). Here, the trial court found that the plaintiff furnished the down payment on the home, was solely liable for and made all the payments on the mortgage, but that the deed to the home named plaintiff and defendant as owners. The court then “concluded as a matter of law that the Defendant obtained title to the real property set out above under circumstances which obligate the Court inequity [sic] to order that a resulting trust will be issued over the title of the property in favor of the plaintiff.”

Defendant argues that the court erred in granting a resulting trust because plaintiff did not specifically request this remedy in her complaint. Plaintiff instead requested “[t]hat the Deed to the property in question be reformed removing the name of the Defendant from the title and the Defendant be ordered to vacate the premises.” Plaintiff alleged in her complaint that the deed had been placed in both names “by mistake.” Plaintiff moved to amend her complaint to conform to the evidence, and to add a specific prayer for a resulting trust pursuant to Rule 15(b) of the North Carolina Rules of Civil Procedure. Rule 15(b) provides in pertinent part:

When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues.

N.C.R. Civ. P. 15(b) (2001). Normally, “when a non-objecting party allows evidence to be presented at trial outside the scope of the pleadings, the pleadings are deemed amended to conform to the evidence, and no formal amendment is required.” *McDevitt v. Stacy*, 148 N.C. App. 448, 455, 559 S.E.2d 201, 208 (2002). “Where the evidence which supports an unpleaded issue also tends to support an issue properly raised by the pleadings, however, failure to object does not

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amount to implied consent to try the unpleaded issue." *Members Interior Construction v. Leader Construction Co.*, 124 N.C. App. 121, 124, 476 S.E.2d 399, 402 (1996), *disc. review denied*, 345 N.C. 745, 485 S.E.2d 56 (1997). The record does not reflect that defendant responded to the motion to amend, and defendant has not addressed this point in her brief to this Court. However, defendant does take exception to the trial court's finding as fact that "[t]he evidence presented at trial and the pleadings of the Plaintiff place the Defendant on notice that the Plaintiff is entitled to request a resulting trust" as a remedy. Defendant also excepts to the trial court's conclusions of law based on this finding.

Our standard of review where the trial court sits without a jury is whether competent evidence supports the trial court's findings, and whether the findings support the conclusions of law. *See In re of Azalea Garden Bd. and Care, Inc.*, 140 N.C. App. 45, 535 S.E.2d 388 (2000).

In *Mims*, the Supreme Court stated that:

Plaintiff is not precluded from relying on a resulting trust because of deficiencies in his complaint. Although plaintiff does not expressly refer to a resulting trust in his complaint, and prays for reformation of the deed on the ground of mutual mistake, he has pled sufficient facts to state a claim giving rise to a resulting trust.

Mims, 305 N.C. at 59, 286 S.E.2d at 791. "In pleading a resulting trust it suffices to allege the ultimate facts as to who paid the consideration and to whom the conveyance was made." *Bowen v. Darden*, 241 N.C. 11, 14, 84 S.E.2d 289, 292 (1954). In *Mims*, the plaintiff alleged in his complaint that he "told the defendant that he would be furnishing all of the consideration for the purchase of this realty, that he was therefore buying it in his own right as his sole and individual property, and that it would be his and his alone." *Mims*, 305 N.C. at 59, 286 S.E.2d at 791.

In the case at hand, plaintiff alleged in her complaint: (1) defendant stated she did not want the house placed in her name; (2) the closing attorney informed the plaintiff that the title would be placed in her name; (3) the closing attorney placed title in the names of both plaintiff and defendant jointly; and (4) defendant has refused to make any payments on the property. Defendant argues that because plaintiff did not specifically allege in the complaint that defendant paid none of the consideration for the purchase of the property, that plain-

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tiff did not allege sufficient facts to state a claim giving rise to a resulting trust. Therefore, defendant argues the trial court's choice of remedy was in error. We disagree.

Although the *Mims* Court noted that the plaintiff alleged facts in his complaint sufficient to state a claim, *Mims* was an appeal from a summary judgment ruling, and not from disposition of a motion to dismiss for failure to state a claim. In light of the procedural posture in *Mims*, the Court further provided that:

In this context, particularly, "the nature of the action is not determined by what either party calls it." At summary judgment the nature of the action is determined *not only by the pleadings and the nature of the relief sought, but also by the facts* "which, on motion for summary judgment, are forecast by the evidentiary showing."

Mims, 305 N.C. at 61, 286 S.E.2d at 792 (internal citations omitted) (emphasis added). Thus, in determining that the plaintiff was entitled to a resulting trust, the *Mims* Court did not limit itself to the allegations of the complaint. Similarly, the trial court here considered not only the allegations and relief requested in the complaint, but also the other pleadings including the motion to amend, and evidence presented by the parties in choosing the remedy.

Thus the question for us on appeal of this issue is whether the evidence was sufficient to support the court's finding that the pleadings and the evidence gave notice to the defendant that a resulting trust was a possible remedy. The plaintiff testified that the money for the down payment on the house came from gifts from her family and from the sale of stock that plaintiff had inherited from her family. Plaintiff further testified that defendant did not contribute any amount to the down payment. Finally, plaintiff testified that both she and defendant intended that the house be titled solely in plaintiff's name so that plaintiff could qualify for aid in closing costs from her employer. We believe that this evidence, along with the pleadings and motion to amend, was sufficient to establish the elements of a resulting trust and to provide adequate notice to defendant that it was a possible remedy. Therefore, we conclude that the evidence supported the trial court's findings of fact, which in turn support the conclusion of law that a resulting trust was the proper remedy.

[2] Defendant next argues that the trial court erred in not stating in its judgment what burden of proof it used in its decision to grant a

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resulting trust. We can find no authority to support defendant's argument. The case defendant cites in her brief, *In re Church*, 136 N.C. App. 654, 525 S.E.2d 478 (2000), involved the failure of a trial court to comply with a statutory requirement that grounds to terminate a biological parent's parental rights be shown by "clear, cogent and convincing evidence," and that the order so state. N.C. Gen. Stat. 7A-289.30(e), *repealed by* 1998 N.C. Sess. Laws 202, s.5 (now codified at N.C. Gen. Stat. 7B-807, 7B-1109 (2001)); *see also* *In re Anderson*, 151 N.C. App. 94, 564 S.E.2d 599 (2002). There is no such statutory requirement here, nor is there a general requirement that the trial court state in its judgment the burden of proof it used. Moreover, defendant bases this argument on the language of earlier holdings that plaintiff was required to show "clear, cogent and convincing" evidence to prove a resulting trust. *See, e.g., Mims*, 305 N.C. at 57, 286 S.E.2d at 790; *Bass v. Bass*, 229 N.C. 171, 173, 48 S.E.2d 48, 49 (1948); *Bowen v. Darden*, 241 N.C. 11, 14, 84 S.E.2d 289, 292 (1954). However, this burden appears to have been imposed in those cases to overcome a presumption of gift existing at that time between a husband and wife or between family members. "When the presumption of gift is rebutted the effect is 'automatically to create a resulting trust' in favor of the party furnishing the purchase price." *Mims*, 305 N.C. at 58, 286 S.E.2d at 790 (quoting 5 Scott on Trusts, § 443 at 3345 (3d ed. 1967)). No such presumption of gift applies here. Even if a heightened burden of proof applied here, we are not persuaded that the trial court was obligated to state so in its judgment.

[3] Defendant next argues that the trial court's findings of fact did not support the conclusion that plaintiff was entitled to damages for fraud. On appeal, we review the trial court's conclusions of law *de novo*. *See Clark v. City of Asheboro*, 136 N.C. App. 114, 119, 524 S.E.2d 46, 50 (1999).

This Court has held that the "elements of fraud are: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) *made with intent to deceive*, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Allen v. Roberts Constr. Co.*, 138 N.C. App. 557, 532 S.E.2d 534 (2000), *disc. review denied*, 353 N.C. 262, 546 S.E.2d 90 (2000) (emphasis added).

"In order to constitute fraud there must be false representation, known to be false, or made with reckless indifference as to its truth, *and it must be made with intent to deceive.*" *Myers &*

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Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 568, 374 S.E.2d 385, 391, (1988), *reh'g denied*, 324 N.C. 117, 377 S.E.2d 235 (1989). "While the concept of a statement made with reckless indifference as to its truth . . . or the concept of concealment of a material fact have been held to satisfy the element of false representation, those concepts do not satisfy the element of a statement made with intent to deceive." *Id.*

Here, plaintiff alleges that the defendant acquired credit cards in the plaintiff's name without the plaintiff's knowledge, that the defendant falsely assured plaintiff that she (defendant) was also liable on the cards, and incurred significant charges in plaintiff's name on the credit cards. Plaintiff testified that while she knew about some of the cards, it was her understanding that defendant was transferring balances from old cards to new ones and getting rid of the old cards. It was also plaintiff's understanding that the total balance on all the cards was twenty thousand dollars (\$20,000) and that she and defendant were jointly liable for the total amount. In fact, the total balance as of the time of the complaint was thirty-nine thousand, seven hundred eighteen dollars and nineteen cents (\$39,718.19) and plaintiff was solely liable. Plaintiff further testified that defendant handled all of their finances and that plaintiff was unable to see the records of all of their credit card statements.

The trial court made extensive findings of fact concerning the plaintiff's credit card debt and defendant's actions, including that at the end of their relationship there were eight credit cards acquired by defendant in plaintiff's name; that plaintiff was unaware of four of them; and that "[o]ver the course of the relationship the Defendant deceived the Plaintiff by informing the Plaintiff at various times in the relationship that their credit card debt was \$10,000.00 or less." In addition, the court found that defendant's testimony was not credible and that:

The Defendant engaged in a pattern of deceit over the course of the relationship with the Plaintiff:

- a. The Defendant did not inform the Plaintiff of all of the credit card applications which were made in the Plaintiff's name using the Power of Attorney;
- b. The Defendant did not execute the credit card applications as Power of Attorney for the Plaintiff but by executing the Plaintiff's name solely;

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- c. The Defendant did not list herself as a joint obligor on the credit cards although giving herself full access to the line of credit issued by the credit card, in fact informing the Plaintiff that they were joint obligors;
- d. The Defendant at various times during the relationship removed the Plaintiff's mailbox key from her key chain;
- e. The Defendant informed the Plaintiff that all financial records of the parties were maintained in a box located in the home;
- f. When the Plaintiff became suspicious and checked the box there were no financial records of any meaning located in the box but only trash;
- g. The Defendant deceived the Plaintiff by grossly underestimating the number and amount of the credit card bills and by informing the Plaintiff that the credit card bills could be paid off by the casualty settlement over the fire in the state of Alabama;
- h. The Defendant received all statements of the credit cards with very limited exceptions the Plaintiff never saw the credit card statements and as set out above would occasionally go to the mailbox to find that her mailbox key had been removed.
- i. The Defendant would then return the mail box key to the Plaintiff stating that she had had a need to borrow the mail box key;
- j. At the separation of the parties the total credit card debt balance was approximately \$39,700;
- k. When the Plaintiff [sic] wrecked an automobile in Moore County as further evidence of her continued pattern of deceit, she informed a police officer investigating the accident that her employment was [as] a counselor;
- l. There was no evidence produced that the Defendant had ever been a counselor or that she was doing this at the time of the citation.

The court's findings in this case go beyond mere concealment of facts. They establish, in addition to concealment of material facts, that defendant's actions were repeated and deliberate, and that

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defendant's "continued pattern of deceit" included making false statements to the plaintiff, to creditors, to the court and to law enforcement officers. Even though the findings do not include a specific finding that defendant acted with intent to deceive, we are unable to read these findings as revealing anything but intentionally deceptive conduct. Under these unusual circumstances, therefore, we hold that the findings of fact support the conclusion that defendant intended to deceive and did in fact deceive the plaintiff. We therefore affirm the trial court on this issue.

[4] Finally, defendant argues that the trial court committed reversible error in concluding as a matter of law that she failed to establish her counter-claim for unjust enrichment, when the court made no findings of fact concerning the issue. We disagree. This Court has held that "[g]enerally, when a trial court fails to make required findings of fact, the case must be remanded to the trial court for entry of findings. However, when the evidence in the record as to a finding is not controverted, remand is not required." *Pitts v. American Sec. Ins. Co.*, 144 N.C. App. 1, 18, 550 S.E.2d 179, 192 (2001) (citations omitted). Defendant claims that she "expended substantial sums of money, in an amount to be proved at trial" and "substantial labor" improving the house and property which she and the plaintiff both occupied. Ralph Warding, the defendant's father, testified at trial that he worked on the property and made various improvements. Neither defendant's testimony nor Mr. Warding's provided evidence of the value of the improvements, which is a necessary element to recover for unjust enrichment beyond nominal damages. See *Johnson v. Sanders*, 260 N.C. 291, 295, 132 S.E.2d 582, 586 (1963). Because defendant failed to meet her burden of producing evidence to prove the necessary elements of her claim, remand is not necessary. See *Arnold v. Ray Charles Enterprises, Inc.*, 264 N.C. 92, 99, 141 S.E.2d 14, 19 (1965) (where the court fails to find an essential fact, but the record shows that the party having the burden of proving such fact has not introduced evidence sufficient to sustain such fact, remand would be futile).

In summary, we conclude that the trial court correctly determined that when plaintiff showed that she supplied all the purchase money for the real property, a resulting trust was created in her favor. The trial court did not err in granting plaintiff this remedy even though she did not specifically request it in her complaint, since the complaint and the evidence presented at trial, as well as the motion to amend, served as notice to the defendant that a resulting trust was

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a possible remedy. We further hold that the trial court did not err in its conclusion of law that plaintiff was entitled to damages for fraud. Finally, we hold that while the trial court did not find facts to justify its conclusion of law denying defendant damages on her counterclaim for unjust enrichment, remand is not necessary.

Affirmed.

Chief Judge EAGLES and Judge BRYANT concur.

RHONDA LEVENS, EMPLOYEE, PLAINTIFF v. GUILFORD COUNTY SCHOOLS, EMPLOYER,
SELF-INSURED (N.C. SCHOOL BOARDS ASSOCIATION AND KEY RISK GROUP,
THIRD-PARTY ADMINISTRATORS), DEFENDANTS

No. COA01-1097

(Filed 20 August 2002)

1. Workers' Compensation—handicapped housing—remodeling versus construction of a new home

The Industrial Commission did not err in a workers' compensation case by failing to require defendant employer to build plaintiff employee a new house and by giving defendant the option of remodeling plaintiff's existing home to render it handicap-accessible, because: (1) defendant was permitted to pursue alternatives to remodeling plaintiff's existing home as long as any home prepared for plaintiff, including a remodeled or new home, complied with reasonably medically necessary specifications; and (2) competent evidence supported this finding.

2. Workers' Compensation—attendant care—reimbursement rate

The Industrial Commission did not err in a workers' compensation case by establishing an attendant care reimbursement rate of \$10.00 per hour for plaintiff employee's family members because competent evidence, including the testimony of a registered nurse, gave the higher rates home health agencies charged per hour versus the lower amount home health-care attendants earn, which supported the Commission's findings.

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3. Workers' Compensation— attendant care—retroactive payment rate

The trial court did not err in a workers' compensation case by ordering retroactive payment to plaintiff employee's family members for attendant-care services at a rate equivalent to that paid to a trained certified nursing assistant, because: (1) a nurse witness testified that attendant care need not be provided by a certified nursing assistant; (2) the record shows that the required attendant care services prescribed by a doctor were being adequately provided by plaintiff's family members; and (3) there is ample evidence in the record to support the Commission's finding of fact, unchallenged by defendant employer, concerning the fair rate for services provided by the family members.

4. Workers' Compensation— retroactive attendant care— defense of claim without reasonable grounds—attorney fees and costs

The trial court did not err in a workers' compensation case by concluding that defendant employer had defended plaintiff employee's claim for retroactive attendant care without reasonable grounds and that plaintiff was therefore entitled to reasonable attorney fees and costs, because there is no evidence in the record that defendant made any attempt to find attendant care between January 1999 when a doctor first ordered attendant care and August 1999, despite defendant's contention that it attempted to find attendant care from the time it was ordered by plaintiff's physician.

Appeal by plaintiff and defendants from Opinion and Award of the North Carolina Industrial Commission entered 23 March 2001. Heard in the Court of Appeals 5 June 2002.

Hodgman and Oxner, by Todd P. Oxner, for the plaintiff-appellant-appellee.

Orbock Bowden Ruark & Dilalrd, PC, by Barbara E. Ruark and Devin F. Thomas, for the defendants-appellants-appellees.

WYNN, Judge.

Plaintiff-employee Rhonda Levens and defendant-employer Guilford County Schools appeal from an opinion of the North Carolina Industrial Commission awarding Ms. Levens ongoing disability benefits, reasonably necessary medical care related to her

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compensable injury, reasonable attorneys' fees, and compensation to her family for retroactive and continuing attendant care. We affirm the Commission's opinion and award.¹

On 10 April 1996, Ms. Levens suffered a compensable injury to her upper left extremity as a result of an accident arising out of her employment with Guilford County Schools. In September 1997, the Commission approved the acceptance of liability (Form 21 Agreement) by Guilford County Schools.

As a result of the accident, Ms. Levens underwent a course of medical treatment including two surgeries, but developed reflex sympathetic dystrophy; she has only minimal use of her extremities and is largely confined to a wheelchair. Her treating physician, Dr. Gary Poehling (an orthopaedic surgeon chosen by Guilford County Schools) ordered attendant care for her, increasing from two to three hours daily in January 1999 to eight hours daily in May 1999.

In September 1999, Ms. Levens obtained a hearing before Deputy Commissioner Amy L. Pfeiffer on her claims for benefits arising from the compensable claim. Before the hearing, the parties stipulated that Ms. Levens was totally and permanently disabled, agreed that Ms. Levens was entitled to either have modifications made to her existing home or have a new, handicap-accessible house built, and, agreed that the primary issue for determination before the Deputy Commissioner was whether Ms. Levens was entitled to retroactive payments to her family members for having provided her with attendant care. As of the close of the evidentiary record before Deputy Commissioner Pfeiffer, Guilford County Schools had not provided Ms. Levens with the requested attendant care. As a result, Ms. Levens' family assumed all attendant care responsibilities.²

1. We note that on 19 October 2001, defendant-appellant filed a motion for an extension of time to file its brief. This motion was allowed by this Court pursuant to an order filed on 22 October 2001, requiring defendant-appellant's brief to be filed on or before 1 December 2001, with no further extensions barring a showing of extraordinary cause. However, defendant-appellant's brief was not filed until 5 December 2001. Similarly, plaintiff-appellant filed a motion on 2 November 2001 for an extension of time to file its brief. This motion was allowed by this Court pursuant to an order filed on 5 November 2001, requiring plaintiff-appellant's brief to be filed on or before 1 December 2001, with no further extensions barring a showing of extraordinary cause. Nonetheless, plaintiff-appellant's brief was not filed until 4 December 2001. While defendant-appellant's and plaintiff-appellant's briefs were not timely filed before this Court, we nonetheless consider the merits of their appeals. *See* N.C.R. App. P. 2 (2002).

2. The family members providing care to Ms. Levens included her two children (both of whom were minors as of the hearing date before Deputy Commissioner Pfeiffer) as well as her husband and aunt.

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In April 2000, Deputy Commissioner Pfeiffer ordered Guilford County Schools to continue paying Ms. Levens temporary total disability benefits; and to pay all reasonable medical expenses, past and future, incurred by Ms. Levens for treatment of her reflex sympathetic dystrophy, including the attendant care prescribed by Dr. Poehling. Deputy Commissioner Pfeiffer further ordered Guilford County Schools to pay Ms. Levens' family for attendant care at the rate of \$14.00 per hour on weekdays, \$15.00 per hour on weekends, and \$21.00 per hour on holidays, including retroactive payments for attendant care performed from 19 April 1999 and continuing until such time as the Commission gave Guilford County Schools permission to cease such payments. Furthermore, Deputy Commissioner Pfeiffer concluded that Guilford County Schools had defended Ms. Levens' claim without reasonable ground, and ordered Guilford County Schools to pay Ms. Levens' attorney a fee equal to twenty-five percent of the lump sum amount retroactively paid for attendant care. Additionally, Guilford County Schools was ordered to authorize (1) the purchase of a golf cart for Ms. Levens' use, subject to Dr. Poehling's approval, and (2) payment of any necessary deposit for the construction of a new handicap-accessible house for Ms. Levens, subject to Dr. Poehling's approval of the house design. Guilford County Schools appealed to the full Commission.

From that appeal, in March 2001, the Commission entered an opinion and award ordering Guilford County Schools to (1) continue paying Ms. Levens permanent and total disability benefits; (2) pay for all medical expenses reasonably necessary to effect a cure or lessen or relieve Ms. Levens' reflex sympathetic dystrophy, including retroactive and continuing attendant care as prescribed by Dr. Poehling; (3) pay Ms. Levens' family \$10.00 per hour for providing attendant care, including retroactive payment for attendant care from January 1999 continuing until further order by the Commission; (4) pay to Ms. Levens' attorney, as a consequence of Guilford County Schools' unreasonable defense of Ms. Levens' claim, a fee equal to twenty-five percent of the lump sum retroactively paid by Guilford County Schools for attendant care, to cover Ms. Levens' attorneys' fees and litigation costs. Additionally, the Commission ordered Guilford County Schools to pay any deposits necessary for remodeling Ms. Levens' existing home, or to construct a new handicap-accessible home on Ms. Levens' property, subject to the approval of such plans by Dr. Poehling or a life-care planner. Both parties appeal to this Court.

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I. Standard of Review

On an appeal from an opinion and award of the Commission, this Court is generally limited to addressing two questions: (1) Whether there is any competent evidence to support the Commission's findings of fact; and (2) Whether the Commission's findings of fact support its conclusions of law. *See Lowe v. BE&K Construction Co.*, 121 N.C. App. 570, 573, 468 S.E.2d 396, 397 (1996). The Commission's findings are conclusive on appeal if supported by any competent evidence, even where the evidence may support a contrary finding. *See Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 652-53, 508 S.E.2d 831, 834 (1998). "[T]he Commission is the sole judge of the credibility of the witnesses as well as how much weight their testimony should be given." *Id.* at 653, 508 S.E.2d at 834.

II. Ms. Levens' Appeal

[1] In her appeal, Ms. Levens' contends that the Commission erred in (1) not requiring Guilford County Schools to build her a new house³, and (2) establishing an attendant care reimbursement rate of \$10.00 per hour for Ms. Levens' family members. We disagree.

In its award and order concerning remodeling Ms. Levens' existing home or building her a new one, the Commission presented Guilford County Schools with the option of remodeling Ms. Levens' existing home to render it handicap-accessible or constructing a handicap-accessible new home for her, stating:

[Guilford County Schools] is not required to construct a new home for [Ms. Levens] but may use this as a reasonable option. The details of the building or remodeling shall be decided by reasonableness and medical necessity shall govern where there are any conflicts between the parties.

Ms. Levens contends that this portion of the opinion and award is "contrary to North Carolina law, fails to take into consideration the stipulations and waivers of [Guilford County Schools], and is not supported by the evidence". We disagree.

We note that the Commission's opinion and award contained no stipulations, findings of fact or conclusions of law concerning the

3. The record notes that Ms. Levens was initially opposed to the idea of moving into a new handicap-accessible house, instead preferring to make modifications to her existing home. Ms. Levens acknowledged as much in her brief to the full Commission, wherein she also stated that "for handicapped housing North Carolina law requires only that the modifications be made, not that new construction be made."

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remodeling of Ms. Levens' existing house or the construction of a new handicap-accessible house for her. However, the Commission incorporated by reference several orders entered by Deputy Commissioner Pfeiffer, including: (1) An order entered on 29 September 1999, ordering Guilford County Schools, within sixty days from the filing thereof, to:

secure an additional estimate or estimates of the cost of implementing the housing plans already drawn up and approved by [Ms. Levens'] treating physician. In the alternate, [Guilford County Schools] may pursue other appropriate avenues, such as modular housing. If [Guilford County Schools] has been unable to secure appropriate alternatives to [Ms. Levens'] plan and contractor, [Guilford County Schools] will be bound by [Ms. Levens'] plan and the use of [Ms. Levens'] contractor.

(2) An order entered 1 March 2000, stating that "[Guilford County Schools] has agreed to pay expenses charged by J.C. Williams Construction, Inc., and accordingly it should do so as soon as is practicable." Per this order, Deputy Commissioner Pfeiffer also ordered that "if A to Z Contractors is the company that will remodel [Ms. Levens'] home, this contractor MUST adhere to the specifications set forth by Dr. Poehling, [Ms. Levens'] treating physician." (3) An order entered 7 March 2000, ordering [Guilford County Schools] to "make [its] decision about which builder to employ, and [Guilford County Schools] shall authorize same to commence construction no later than 24 March 2000. This does not imply that construction must begin by this date." (4) An order entered 4 April 2000, ordering [Guilford County Schools] to pay J.C. Williams Construction and to "comply immediately with the order filed by the undersigned on 1 March 2000, or [] be subject to sanctions."

These orders, incorporated by the Commission into its opinion and award and unchallenged by Ms. Levens, indicate that the parties obtained several estimates from various contractors for remodeling Ms. Levens' existing home. The record contains an estimate from contractor Michael Pendleton, Inc. dated 13 August 1999 for \$102,335 for proposed "repairs and modifications" to Ms. Levens' existing home to make it handicap-accessible. The Deputy Commissioner's September 1999 order then provides Guilford County Schools the opportunity to seek additional estimates to implement the same modifications "approved by [Ms. Levens'] treating physician," or to "pursue other appropriate avenues, such as modular housing." In her March 2000 order, Deputy Commissioner refers to A to Z Contractors plans to

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“remodel [Ms. Levens’] home.” The record contains two estimates obtained by Guilford County Schools from A to Z Contractors, Inc., to renovate Ms. Levens’ home; the first estimate obtained from A to Z Contractors totaled \$98,726.52; the second estimate totaled approximately \$67,883. Addressing Ms. Levens’ concerns that this second estimate did not involve modifications that would meet Dr. Poehling’s specifications, Deputy Commissioner Pfeiffer specified in the 1 March 2000 order that any plans to remodel Ms. Levens’ home must conform to Dr. Poehling’s specifications.

Notably absent from the record are any estimates for constructing a new home for Ms. Levens subject to Dr. Poehling’s specifications. Nonetheless, the Deputy Commissioner’s orders, incorporated by reference into the Commission’s 23 March 2001 opinion and award, make clear that Guilford County Schools was permitted to pursue alternatives to remodeling Ms. Levens’ existing home, as long as any home prepared for Ms. Levens (whether a remodeled home or a new home) complied with reasonably medically necessary specifications. While Ms. Levens challenges the Commission’s order stating that Guilford County Schools is not *required* to build Ms. Levens a *new* home, (but may consider this as a reasonable option) subject to reasonably medically necessary specifications, we conclude that competent evidence existed before the Commission to support this portion of its award and order. Accordingly, we hold that the Commission did not err in ordering that [Guilford County Schools] need not necessarily build Ms. Levens a new handicap-accessible home, nor did the Commission err in ordering that the details of any new home construction or remodeling should be governed by “reasonableness and medical necessity,” without specifically ordering that Dr. Poehling’s specifications be followed.

[2] Ms. Levens next argues that the Commission erred in concluding and ordering that her family members should be paid for attendant care “at the reasonable rate of \$10 per hour.” The Commission’s unchallenged findings indicate that in August 1999, Guilford County Schools hired Janet Groce, a registered nurse, as a medical case manager. Ms. Groce spent several months contacting home health agencies in an unsuccessful attempt to locate someone to take Ms. Levens’ case. Ms. Groce testified before Deputy Commissioner Pfeiffer that home health agencies normally charge \$14.00-15.00 per hour, while home health-care attendants earn \$9.00-10.00 per hour. Ms. Levens challenges the Commission’s statement that “these rates are for professional attendant care and [are] not indicative of a fair

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rate for care given by family members.” Additionally, Ms. Levens specifically challenges the Commission’s finding that Ms. Levens’ family members should be compensated “at a rate that takes into consideration the rate charged by professional home health care agencies and the hourly rate actually received by an individual attendant and the fact that the care has been provided by family members who are not professionals.”

However, the record contains testimony supporting the commission’s findings. For instance, Ms. Groce testified in her deposition that home health care agencies typically pay their certified nursing assistants rendering in-home attendant services “anywhere from \$8.50 to ten, a little over \$10 per hour”; however, the agencies charge a higher rate, typically between \$13.50 and \$14.50 per hour, to the insurance company or other payor. In light of our review of the record in this case showing that the Commission’s findings of fact are supported by competent evidence, we uphold the resulting conclusions by the Commission on the hourly rate entitlement of Ms. Levens’ family members.

III. Guilford County Schools’s Appeal

[3] In its appeal, Guilford County Schools first argues that the Commission erred in ordering retroactive payment to Ms. Levens’ family members for attendant-care services “at a rate equivalent to that paid to a trained certified nursing assistant.” Guilford County Schools argues that “[Ms. Levens’] family members should not be paid at the same rate as a professional home health worker.”

The Commission’s findings challenged by Guilford County Schools are as follows:

5. [O]ut of necessity, [Ms. Levens’] family assumed all attendant care responsibilities with the exception of [] two isolated occasions. . . . [Ms. Levens’ husband] resigned his position [as a long-haul truck driver] to be home to assist with [Ms. Levens’] attendant care. Additionally, [Ms. Levens’] husband’s aunt has been involved with the attendant care.

. . .

11. As of the date of the hearing before the Deputy Commissioner, [Ms. Levens’] family had provided all attendant care, with the exception of two weeks at the most, required by Dr. Poehling’s instructions, as follows:

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(a.) From 25 January through 19 April 1999—a average of 2.5 hours per day.

(b.) From 20 April through 6 May 1999—6 hours per day.

(c.) From 7 May 1999 through 22 September 1999—8 hours per day.

12. The greater weight of the evidence establishes that [Ms. Levens'] family should be reimbursed and compensated for providing retroactive as well as ongoing attendant care for [Ms. Levens] as prescribed by [Ms. Levens'] treating physician.

The Commission concluded accordingly that:

2. [Guilford County Schools] is required to provide [Ms. Levens] with reasonably necessary medical treatment related to her compensable injury by accident which tends to effect a cure, provide relief, or lessen the period of disability, including retroactive and continuing attendant care. N.C.G.S. § 97-2(19) and §97-25 [2001].

...

4. [Guilford County Schools] shall pay [Ms. Levens'] family for attendant care retroactively . . . at the reasonable rate of \$10.00 per hour which takes into consideration the rate charged by professional home health care agencies and then hourly rate actually received by an individual attendant and the fact that the care has been provided by family members who are not professionals. N.C.G.S. §97-25; *London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 525 S.E.2d 203 (2000).

Guilford County Schools argues that there is insufficient evidence in the record to indicate that the care provided by Ms. Levens' family members "was reasonably required to effect a cure, give relief, or lessen the period of Ms. Levens' disability," such that Ms. Levens failed to demonstrate how much her family members should be paid for their services, if anything. Furthermore, Guilford County Schools contends that there is insufficient documentation of the hours worked by Ms. Levens' family members providing attendant care services, and argues that Ms. Levens' family members should not be compensated at the same rate as a properly-trained and skilled attendant caregiver. The record does not support these contentions.

Significantly, Guilford County Schools does not contest the Commission's findings that (1) Dr. Poehling ordered Ms. Levens to

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receive attendant care as a result of her reflex sympathetic dystrophy, (2) on 25 January 1999, Dr. Poehling wanted Ms. Levens to receive two to three hours of attendant care daily, (3) on 19 April 1999, Dr. Poehling increased this to six hours of attendant care daily, and (4) on 6 May 1999, Dr. Poehling increased this to eight hours of attendant care daily. Guilford County Schools also does not contest the Commission's finding that it had not provided Ms. Levens with the attendant care as ordered by Dr. Poehling as of the close of the evidentiary record. Furthermore, Ms. Levens' testimony before Deputy Commissioner Pfeiffer adequately supported the Commission's finding that Ms. Levens' family members assumed all attendant care responsibilities, and provided the necessary care as prescribed by Dr. Poehling.

Additionally, there is ample evidence in the record indicating that the attendant care provided by Ms. Levens' family members was reasonably required to provide relief from her disability; indeed, Ms. Groce testified that attendant care need not be provided by a certified nursing assistant, but may instead be adequately provided by a family member. Evidence in the record shows that the required attendant care services prescribed by Dr. Poehling were being adequately provided by Ms. Levens' family members.

Moreover, with respect to the hours worked by Ms. Levens' individual family members providing attendant care services, the Commission did not allocate payments to individuals but rather ordered Ms. Levens to submit payment information to Guilford County Schools including the allocation of the time for each individual to allow Guilford County Schools to direct payment appropriately. Regarding the payment rate of \$10 per hour, we conclude, as above, that the Commission's findings of fact adequately support its conclusions of law in this respect. There is ample evidence in the record to support the Commission's finding of fact, unchallenged by Guilford County Schools, that "the fair rate for attendant care provided [to Ms. Levens] by family members is \$10.00 per hour." This argument is overruled.

[4] Lastly, Guilford County Schools argues that the Commission erred in concluding that it had defended Ms. Levens' claim for retroactive attendant care without reasonable grounds and that Ms. Levens was therefore entitled to reasonable attorneys' fees and costs. However, in testimony before Deputy Commissioner Pfeiffer on 22 September 1999, Jean Suiter, an employee with the North Carolina

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School Board Association, indicated that, while she had made attempts to find attendant care for Ms. Levens, she could not recall the agencies she had dealt with. Near the end of August 1999, Ms. Suiter asked Marguerite Hill to assist with finding attendant care for Ms. Levens.

Acknowledging that “there seemed to have been a dropping of the ball somewhere,” Ms. Suiter stated that, at the time of her testimony, both Ms. Groce and Ms. Hill, each of whom was hired in August 1999, were still working on obtaining quotes for attendant care for Ms. Levens. There is no evidence in the record that Guilford County Schools made any attempt to find attendant care for Ms. Levens between 25 January 1999, when Dr. Poehling first ordered attendant care, and August 1999, despite Guilford County Schools’ assertion in its brief that it “attempted to find attendant care for plaintiff from the time that it was ordered by her physician.” Accordingly, we conclude that the Commission’s conclusions of law on this issue are supported by its findings of fact, which are in turn supported by competent evidence in the record. Guilford County Schools’ arguments to the contrary are without merit.

Affirmed.

Judges HUNTER and THOMAS concur.

RICHARD G. STEEVES, PETITIONER v. SCOTLAND COUNTY BOARD OF HEALTH
AND SCOTLAND COUNTY, RESPONDENTS

No. COA01-1271

(Filed 20 August 2002)

1. Appeal and Error— remand—law of the case

The superior court was free to change its conclusions on remand of a case involving the dismissal of a county health director where the remand was for reconsideration under the proper standard of appeal. The appellate court did not reach the merits and the trial court’s first ruling was not the law of the case.

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2. Public Officers and Employees— dismissal without notice—unacceptable personal conduct—contracts not preaudited

A county health director's failure to obtain preaudits of contracts in violation of N.C.G.S. § 159-28 did not constitute unacceptable personal conduct sufficient to warrant dismissal without prior warning. The legislature did not intend to include as "unacceptable personal conduct" an administrative requirement of which no one informed petitioner during the seven years he performed his duties. The violation of state or federal law contemplated by the regulation defining unacceptable personal conduct must be a violation of law which threatens to immediately disrupt work, threatens the safety of persons or property, or is a violation for which a reasonable person would expect to be dismissed without warning.

Appeal by petitioner from orders entered 8 December 2000 and 31 July 2001 by Judge Dexter Brooks in Scotland County Superior Court. Heard in the Court of Appeals 12 June 2002.

Voerman Law Firm, P.L.L.C., by David P. Voerman and David E. Gurganus, for petitioner-appellant.

Poyner & Spruill L.L.P., by Thomas R. West, Terry Richard Kane and Pamela A. Scott, for respondent-appellees.

HUDSON, Judge.

Richard G. Steeves ("petitioner") appeals from an order affirming a decision of the Scotland County Board of Health (the "Board") and an order denying his motion for new trial, amendment of judgment and relief from judgment. For the reasons below, we reverse the superior court's order affirming the decision of the Board. Thus, petitioner's motion for new trial, amendment of judgment and relief from judgment is moot.

By letter dated 23 June 1997, the Board dismissed petitioner from his employment as the Scotland County Health Director, because of "unacceptable personal conduct in violating State law." In the letter, the Board stated that petitioner had violated the Local Government Finance Act (the "Act"), see N.C. Gen. Stat. § 159-28 (2001), which requires that contracts be preaudited by the finance officer, and identified several contracts that did not contain the requisite pre-audit certificate.

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Petitioner filed a petition for contested case hearing in the Office of Administrative Hearings (“OAH”). His petition was accompanied by a sworn statement, which incorporated a letter that he and his attorney had written to the Board. This letter included petitioner’s responses to the charges that the Board had made against him. In particular, petitioner stated the following:

The first time I ever received the Local Government Budget and Fiscal Control Act or had actually read the Act was on May 20, 1997, after I had personally ordered and received it from the Institute of Government. I had received no specific training in the implementation of the Act, and I did not realize that contracts with the county always legally required a pre-audit statement. It had been my practice, in my seven (7) years as the Health Director with Scotland County, to enter into contracts that were validly budgeted and had been approved during the budget process. I was aware, on some occasions, that the “pre-audit statement” was placed upon contracts that had been developed by the County. Contracts that were developed by third parties for our signatures did not generally contain any pre-audit statement on them. I was also aware, generally, that I was not supposed to enter into contracts without valid budgetary approval; therefore, I can assure you that none of the contracts in question were signed or executed unless the funds had been budgeted. On contracts that were prepared by us and which generally contained the pre-audit statement, the only question that was ever asked was whether the money had been budgeted. I believe that to be the important matter, and I was certainly not aware that the pre-audit statement would take on the importance that it apparently now has.

After responding to the petition, respondents moved for judgment on the pleadings. The Administrative Law Judge (the “ALJ”) found that “all material matters of fact are admitted in the pleadings and only questions of law remain.” Pursuant to N.C. Admin. Code tit. 26, r. 3.0101(1) (June 2002), the ALJ issued a recommended decision on the pleadings, recommending that the Board’s decision to terminate petitioner’s employment be affirmed.

The ALJ concluded in relevant part:

The Petitioner contends . . . that “procedures under the State Personnel Act require prior warnings before an individual can be dismissed for job performance related matters.” Yet it is clearly

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the law of North Carolina that when the job-related misfeasance constitutes a violation of law, it is unacceptable personal conduct for which no such warnings are required. 25 N.C. Admin. Code 11.2304, 2305; *Fuqua v. Rockingham County Bd. of Social Services*, 125 N.C. App. 66, 71-73, 479 S.E.2d 273 (1997).

Moreover, the very nature of the Petitioner's work-related offenses militate against acceptance of his argument. It is the obvious purpose of the Local Government Budget and Fiscal Control Act to subject local officials such as health directors to enhanced supervision in their contracting decisions and practices through preauditing. When an official ignores these oversight provisions, as the Petitioner in this case did, the results may include unwise and irregular contracts precisely because a statutory safeguard has been evaded. That is, the Petitioner's illegal contracting practices subverted and negated the exact system of supervision, counseling, and corrective discipline in which he now seeks refuge.

(citation omitted).

Pursuant to N.C. Gen. Stat. § 126-37(b1) (2001), the State Personnel Commission (the "SPC") reviewed the ALJ's recommended decision and rendered an advisory decision to the Board. The SPC recommended that the Board reject the ALJ's decision, reinstate petitioner, and issue him a written warning.

The Board voted to reject the SPC's recommendation and to accept the ALJ's recommended decision as its final decision. In its final decision, the Board concluded that the SPC failed to make its advisory decision within the statutorily mandated period, and that, as a consequence, by operation of law, the SPC had adopted the ALJ's recommended decision. In the alternative, the Board concluded that even if it was timely, the SPC's advisory decision was in error for several reasons that the Board specified. We need not address the timeliness of the SPC's decision since, by statute, the SPC's decision is advisory only to the Board, which is empowered to reject the SPC's recommendation as long as the Board "state[s] the specific reasons why it did not adopt the advisory decision." *Id.*

Petitioner then filed a petition for judicial review in the superior court. The court concluded that "the conduct alleged by the respondents in their dismissal letter in respect to the petitioner herein does not, as a matter of law, constitute a 'personal misconduct' violation."

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The court reversed the Board's decision and ordered that petitioner be reinstated to his position as Health Director or to a substantially similar position.

The Board appealed the superior court's order to this Court. In an unpublished decision filed on 29 August 2000, this Court remanded the case to the superior court without reaching the merits, because the superior court failed to articulate the standard of review it had applied to each issue raised by the petition for judicial review.

On remand, the superior court changed its decision. The court first determined that the only issues before it for review were legal, and it applied *de novo* review to these issues. Introducing the issue before it, the superior court stated, in part:

Because Petitioner did not except to this Court's conclusion that his conduct constituted unsatisfactory job performance, there is no question about whether Petitioner should be disciplined for unsatisfactory job performance. Because Petitioner's own Pleadings indicate that he failed to submit certain contracts to the County Finance Officer for pre-audit in accordance with the Fiscal Control Act, there is no question about whether Petitioner violated the law. The only question raised with regard to Petitioner's violation of the Fiscal Control Act is whether, as a matter of law, Petitioner's violation of law also constitutes unacceptable personal conduct under relevant state personnel regulations, thus permitting the Board, in its discretion, to discharge him without further warnings.

The court then concluded in relevant part that our decision in *Fuqua v. Rockingham County Board of Social Services*, 125 N.C. App. 66, 479 S.E.2d 273 (1997), was controlling, and that, under *Fuqua*, the Board "properly characterized Petitioner's failure to enter into contracts in accordance with the Fiscal Control Act as unacceptable personal conduct meriting, in the Board's discretion, immediate dismissal." On 8 December 2000, the court filed its order affirming the Board's final decision. Petitioner then filed a motion for new trial, amendment of judgment and relief from judgment pursuant to Rule 59 and Rule 60 of the North Carolina Rules of Civil Procedure. On 31 July 2001, the superior court filed an order denying the motion. Petitioner is now appealing both orders.

[1] Petitioner first argues that our mandate on remand to the superior court required the court to enter a new order reaching the same

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conclusion. We disagree. Because this Court did not reach the merits in the first appeal, the superior court, after reconsideration under the proper standard of review (*de novo*, for issues of law), was free to change its conclusions. Contrary to petitioner's assertion, the superior court's earlier ruling was not the law of the case. *See N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983).

[2] Turning to the merits of the case, we must determine if the superior court correctly determined that the Board, in adopting the ALJ's recommended decision, properly rendered judgment on the pleadings. The OAH has adopted the N.C. Rules of Civil Procedure for application in contested case hearings. *See* N.C.A.C. tit. 26, r. 3.0101(1).

Our Supreme Court has explained:

North Carolina's Rule 12(c) is identical to its federal counterpart. The rule's function is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit. A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain. When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate.

Judgment on the pleadings is a summary procedure and the judgment is final. Therefore, each motion under Rule 12(c) must be carefully scrutinized lest the nonmoving party be precluded from a full and fair hearing on the merits. The movant is held to a strict standard and must show that no material issue of facts exists and that he is clearly entitled to judgment.

The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the non-movant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Ragsdale v. Kennedy, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citations omitted).

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Respondents argue that petitioner admits in his pleading that he violated N.C.G.S. § 159-28 by failing to obtain preaudit of certain contracts, and that this violation is, as a matter of law, sufficient to justify petitioner's dismissal without any prior warning. Whether petitioner's violation of N.C.G.S. § 159-28 constitutes personal misconduct justifying his dismissal without warning is an issue of law, which we review *de novo*. See *Fuqua*, 125 N.C. App. at 70, 479 S.E.2d at 276.

The General Assembly has protected certain state employees by providing that:

No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause. In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights. . . . However, an employee may be suspended without warning for causes relating to personal conduct detrimental to State service, pending the giving of written reasons, in order to avoid undue disruption of work or to protect the safety of persons or property or for other serious reasons. . . . The State Personnel Commission may adopt, subject to approval of the Governor, rules that define just cause.

N.C. Gen. Stat. § 126-35(a) (2001). Pursuant to this statute, the State Personnel Commission (the "Commission") has promulgated regulations. One such regulation provides that

There are two bases for the discipline or dismissal of employees under the statutory standard of "just cause" as set out in G.S. 126-35. These two bases are:

(1) Discipline or dismissal imposed on the basis of unsatisfactory job performance, including grossly inefficient job performance.

(2) Discipline or dismissal imposed on the basis of unacceptable personal conduct.

N.C. Admin. Code tit. 25, r. 11.2301(b) (June 2002). "Unsatisfactory job performance" is "work related performance that fails to satisfactorily meet job requirements as specified in the relevant job description,

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work plan or as directed by the management of the work unit or agency.” N.C. Admin. Code tit. 25, r. 11.2302(a) (June 2002). Before an employee can be dismissed for unsatisfactory job performance, he “must first receive at least two prior disciplinary actions: First, one or more written warnings, followed by a warning or other disciplinary action which notifies the employee that failure to make the required performance improvements may result in dismissal.” N.C. Admin. Code tit. 25, r. 11.2302(c) (June 2002).

By contrast to discipline for unsatisfactory job performance, even a career State employee may be immediately dismissed for grossly inefficient job performance or unacceptable personal conduct. *See* N.C. Admin. Code tit. 25, r. 11.2304(a) (June 2002) (“Employees may be dismissed for a current incident of unacceptable personal conduct.”); N.C. Admin. Code tit. 25, r. 11.2303(b) (June 2002) (“Dismissal on the basis of grossly inefficient job performance is administered in the same manner as for unacceptable personal conduct. Employees may be dismissed on the basis of a current incident of grossly inefficient job performance without any prior disciplinary action.”). “Unacceptable personal conduct” is defined by regulation as:

(1) conduct for which no reasonable person should expect to receive prior warning; or

(2) job related conduct which constitutes violation of state or federal law; or

(3) conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee’s service to the agency; or

(4) the willful violation of known or written work rules; or

(5) conduct unbecoming an employee that is detrimental to the agency’s service; or

(6) the abuse of client(s), patient(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility, or of an animal owned or in the custody of the agency; or

(7) falsification of an employment application or other employment documentation; or

(8) insubordination which is the willful failure or refusal to carry out a reasonable order from an authorized supervisor.

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Insubordination is considered unacceptable personal conduct for which any level of discipline, including dismissal, may be imposed without prior warning; or

(9) absence from work after all authorized leave credits and benefits have been exhausted.

N.C. Admin. Code tit. 25, r. 11.2304(b) (June 2002).

Here, petitioner violated the preaudit requirements of N.C.G.S. § 159-28, which provides in relevant part as follows:

If an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been preaudited to assure compliance with this subsection. The certificate, which shall be signed by the finance officer or any deputy finance officer approved for this purpose by the governing board, shall take substantially [the form specified].

N.C.G.S. § 159-28(a). There is no indication in the record that petitioner violated any requirements of this statute other than the preaudit provision.

While the record reflects that petitioner technically violated N.C.G.S. § 159-28, we do not agree that this violation constitutes “unacceptable personal conduct,” for which immediate dismissal is permitted under N.C.G.S. § 126-35. This statute, pursuant to which the regulation defining “unacceptable personal conduct” was promulgated, authorizes suspension without warning “in order to avoid undue disruption of work or to protect the safety of persons or property or for other serious reasons.” N.C.G.S. § 126-35(a). The Board showed no such grounds in its pleadings. In his petition, petitioner alleged that although he had held his position for seven years, he was unaware of N.C.G.S. § 159-28(a) or the preaudit requirement and had never received training in its application. Nevertheless, he explained that he only entered into contracts that “were validly budgeted and had been approved during the budget process.” Further, “none of the contracts in question were signed or executed unless the funds had been budgeted.” Respondents did not allege that petitioner’s omission of the preaudit certificate on the few contracts noted was likely to produce disruption of work, threat to persons or property, or any other “serious” effect that required immediate action.

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Subsection (b)(1) of N.C.A.C. tit. 25, r. 11.2304 indicates that unacceptable personal conduct comprises “conduct for which no reasonable person should expect to receive prior warning.” With the possible exception of subsection (b)(2), all the other subsections within section (b) are examples of such conduct. For this regulation to be consistent with its enabling legislation (N.C.G.S. § 126-35(a)), we conclude that the violation of state or federal law contemplated in subsection (b)(2) of the regulation must be a violation of law which threatens immediate disruption of work or safety of persons or property, or for which a reasonable person would not expect to receive a warning prior to dismissal. We do not believe that the legislature intended to include as “unacceptable personal conduct” an administrative requirement of which no one informed petitioner during his training or during the seven years he performed his duties as Health Director.

Respondents cite *Fuqua v. Rockingham County Board of Social Services* in support of their contention that a violation of N.C.G.S. § 159-28 is sufficient to justify petitioner’s dismissal without warning. We do not agree that *Fuqua* is controlling. In *Fuqua*, the board dismissed the petitioner on the grounds that he violated a state statute and that he willfully violated work rules. *See Fuqua*, 125 N.C. App. at 71-72, 479 S.E.2d at 276-77. We held that there was substantial evidence in the record to justify the board’s findings that the petitioner had violated state law and had willfully violated known work rules and that such violations constituted personal misconduct. *See id.* at 73, 479 S.E.2d at 277. There, we were not called upon to decide whether an unwitting violation of state law resulting in no apparent detriment to the agency is sufficient to justify dismissal for personal misconduct. Indeed, the evidence in *Fuqua* demonstrated that the petitioner intentionally violated state law in addition to his willful violation of known work rules. *See id.* at 69-73, 479 S.E.2d at 275-77. Even in light of this evidence, however, this Court reluctantly reached its conclusion that the petitioner’s conduct constituted unacceptable personal conduct warranting immediate dismissal:

In view of [his] diligent service to the Department for some twenty-five years, a less strict penalty might have been imposed. However, while we might have been more leniently inclined if sitting as the Board, we cannot say the decision to dismiss petitioner based upon his willful failure to follow county and state purchasing procedures may fairly be characterized as “patently in bad faith” or “fail[ing] to indicate any course of reasoning.”

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Id. at 74, 479 S.E.2d at 278 (quoting *Lewis v. N.C. Dept. of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989)) (second alteration in original).

Here, taking the facts alleged in petitioner's pleading as true, we conclude that petitioner's violation of N.C.G.S. § 159-28 did not, as a matter of law, constitute unacceptable personal conduct sufficient to warrant dismissal without prior warning. Thus, the Board erred in granting judgment on the pleadings to uphold petitioner's dismissal. Accordingly, the superior court's order affirming the decision of the Board is reversed and this matter is remanded to that court for further remand to the Board for reversal of its judgment on the pleadings. In light of this disposition, we need not and do not consider petitioner's remaining assignments of error, including his appeal of the superior court's order denying his motion for new trial, amendment of judgment and relief from judgment, which is now moot.

Order affirming decision of Scotland County Board of Health reversed.

Remanded.

Judges WYNN and CAMPBELL concur.

IN THE MATTER OF: KAYLA DESTINY GREENE

No. COA01-1401

(Filed 20 August 2002)

**1. Termination of Parental Rights— child abuse—
Munchausen Syndrome by Proxy—fabrication of medical
problems**

The trial court's termination of respondent mother's parental rights for abuse of the child was supported by clear, cogent and convincing evidence that respondent suffers from Munchausen Syndrome by Proxy; that respondent's intentional actions created a substantial risk of serious physical injury to her child in that, during the two years prior to the child being removed from respondent's home, respondent subjected the child to 25 difference emergency room visits, 60 office visits to pediatricians, 143

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prescriptions, and 8 admissions to the hospital; that respondent fabricated and exaggerated the child's medical problems to medical personnel; and that there was a strong probability of a repetition of abusive behavior because respondent has failed to make any substantial improvements to correct the conditions that led to the child being removed from her custody. N.C.G.S. §§ 7B-101(1)(b), 7B-1111(a)(1).

2. Termination of Parental Rights— best interest of child— consideration by court

The trial court did not err by concluding that it was in a child's best interest to terminate parental rights where the court's 199 findings demonstrate that the court thoroughly considered the child's best interests.

3. Termination of Parental Rights— sealed records—reviewed in camera

The trial court did not err by excluding from a termination of parental rights proceeding documents within DSS files where the trial court inspected the records in camera and turned over to respondent those documents it deemed relevant and material. The remaining, sealed documents were reviewed on appeal and found to shed no light on respondent's ability to care for the child and retain her parental rights.

Appeal by respondent from order entered 12 March 2001 by Judge Christopher W. Bragg in Richmond County District Court. Heard in the Court of Appeals 12 June 2002.

Deane, Williams & Deane, by Jason T. Deane, for petitioner-appellee Richmond County Department of Social Services.

Amanda L. Wilson, attorney advocate for guardian ad litem.

Kenneth A. Swain, for respondent-appellant.

John D. Sullivan, attorney advocate for guardian of respondent.

CAMPBELL, Judge.

Respondent, Dawn Marie Hook Greene, is the mother of one minor child, Kayla Destiny Greene ("Kayla"), born on 9 June 1995. Kayla's father is James Steven Greene. His parental rights were terminated by the Richmond County District Court on 27 November 2000 and are not at issue in this appeal.

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On 11 July 1997, one of the child's pediatricians contacted the Richmond County Department of Social Services ("DSS") to determine whether Kayla was being abused or neglected by respondent. This contact was initiated based on the following:

11. That between the dates of June 17, 1995 and June 16, 1997, the minor child was taken to a hospital emergency room on twenty-five different visits by the Respondent mother; that the Respondent mother complained of [numerous] medical conditions involving the minor child

12. That during the same period from June 17, 1995 to June 16, 1997, the minor child was admitted to the hospital on eight occasions by the Respondent mother after the Respondent mother described symptoms and responses of the baby to medical providers.

13. That during the same period from June 17, 1995 to June 16, 1997, the Respondent mother had the minor child seen by three different pediatricians and two specialists; that pediatricians . . . diagnosed Munchausen Syndrome by Proxy.

14. That during the same period from June 17, 1995 to June 16, 1997, the Respondent mother had made sixty office visits to pediatricians for the minor child and had obtained one hundred and forty-three prescriptions for the minor child.

15. That between the periods of June 17, 1995 and June 16, 1997, the Respondent mother had fabricated and exaggerated medical problems of the minor child to numerous medical personnel in ER rooms, doctor's offices, and through daily phone calls to pediatricians.

Following DSS' involvement, a full medical examination of the child was completed. Based on the results of that examination, several medical providers concluded that respondent suffered from Munchausen Syndrome by Proxy ("MSBP"), a disorder "characterized by a pattern of marked overreaction by the Respondent mother to the minor child's imagined or, usually, minor medical problems[.]" Despite there being no evidence that respondent induced Kayla's injuries, there was direct evidence that respondent fabricated and exaggerated the child's medical problems to medical personnel. Such actions and the numerous prescriptions for the child obtained during a two-year period indicated to DSS that Kayla had received inadequate supervision and was substantially at risk of being overmed-

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icated and physically injured. Thus, the child was placed in the legal custody of DSS and in foster care (under the direction and supervision of DSS) on 24 February 1998 after all other placement alternatives suggested by respondent were exhausted.

Respondent and DSS executed a reunification plan on 19 March 1998. This plan required respondent to participate in mental health therapy, parenting classes, an evaluation of her parenting skills, a psychological evaluation, and visitation with Kayla. However, by 13 August 1998, even though respondent had continued to adhere to the requirements of the reunification plan, she had made no substantial improvements nor had she met any of the goals she had set for herself in therapy. Therefore, on 9 February 1999, the court ordered DSS to locate an examiner to complete a forensic psychological evaluation of respondent to determine if reasonable efforts were being made to correct the conditions which led to the child's removal from respondent's home. Prior to the evaluation being conducted, the court suspended respondent's visitation with Kayla on 4 May 1999 based on the opinions of respondent's therapist and respondent's inability to apply the improvement techniques she learned in therapy. Visits were to resume only if the examiner located by DSS approved the visits and set restrictions.

Dr. Robert Aiello ("Dr. Aiello") was the examiner retained by DSS to evaluate respondent. Upon completing his evaluation (which lasted from 17 May 1999 until 10 July 1999), it was determined that respondent met three of the four criteria for MSBP. Dr. Aiello suggested a four-step treatment program by which respondent could resolve the problems that might lead to child abuse through MSBP. The court adopted this program in an order filed 7 September 1999, which also ordered respondent (1) not to be unsupervised around children or provide any children with child care services, (2) not to have any pets in her temporary or permanent care, and (3) to assist DSS in identifying and securing an accurate support system to help provide a safe environment for Kayla. Dr. Aiello was also of the opinion that:

... Respondent mother have no pets in [her] home so that there would be no concerns that the Respondent mother would transfer her behaviors associated with MSBP to animals; furthermore, Dr. Aiello was of the opinion that tattooing and piercing are forms of self marking and attention seeking behaviors and [if engaged in] are significant in showing that the Respondent mother continues her actions to draw attention to herself.

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Despite the court's order and Dr. Aiello's opinion, respondent continued to maintain a cat in her home and provide child-care services while unsupervised on several occasions during the fall of 1999. Respondent also got two tattoos, a tongue piercing, and checked herself into a hospital psychiatric unit claiming major depression and suicide ideations. Thus, the court relieved DSS from further efforts to reunify respondent with Kayla on 19 November 1999. DSS then instituted this action by filing a motion in the cause for termination of respondent's parental rights on 6 December 1999.

DSS' motion was heard by the court on 5 February 2001. DSS presented evidence regarding respondent's various violations of the court's previous order and her failure to continue or benefit from treatment for her disorder, as well as evidence that Kayla had adjusted well since being placed in foster care and had not experienced any medical problems since being in regular foster placement. Respondent presented no evidence at the hearing. Thus, the court concluded on 12 March 2001 that it would be in the best interests of Kayla to terminate respondent's parental rights because respondent:

2. [Had] . . . abused her minor child as defined by G.S. 7B-101(1) by creating a substantial risk of serious physical injury to the minor child by other than accidental means by fabricating medical problems with the minor child and subjecting the minor child to medical procedures, medications, and surgeries.
3. [Had] . . . wilfully left the minor child in foster care for more than twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances ha[d] been made within twelve months in correcting those conditions which led to the removal of the child.
4. . . . [I]s incapable of providing for the proper care and supervision of the minor child such that the minor child is a dependent juvenile within the meaning of G.S. 7B-101 and there is a reasonable probability that such incapability will continue for the foreseeable future.

Respondent appeals.

Respondent presents nine assignments of error. She abandons her tenth assignment of error in her brief to this Court. After examining respondent's first, fifth, and eighth assignments of error, we conclude that these assigned errors are without merit and do not warrant further discussion in this opinion. Thus, respondent's remaining

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assigned errors present this Court with three issues: (I) whether there was sufficient evidence to support termination of respondent's parental rights; (II) whether termination of respondent's parental rights was in the best interests of the child; and (III) whether the trial court committed reversible error by excluding from evidence certain information contained within the records maintained by DSS.

I.

[1] In an action to terminate parental rights, the petitioner has the burden of proving at the adjudication stage that there is clear, cogent, and convincing evidence to support at least one of the statutory grounds for termination provided in Section 7B-1111 of the North Carolina General Statutes. *In re McMillion*, 143 N.C. App. 402, 408, 546 S.E.2d 169, 173-74, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001). *See also* N.C. Gen. Stat. § 7B-1111 (2001). If the petitioner meets this burden and an order terminating parental rights is subsequently issued, the standard for appellate review of the trial court's decision is whether the court's findings of fact are supported by clear, cogent, and convincing evidence, and whether those findings support the court's conclusions of law. *McMillion*, 143 N.C. App. at 408, 546 S.E.2d at 174. If the termination is supported by such evidence, the trial court's findings are binding on appeal, even if there is evidence to the contrary. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988) (citation omitted).

In the case *sub judice*, the first issue is whether the trial court had clear, cogent, and convincing evidence of grounds to terminate respondent's parental rights. Specifically, respondent assigns error to the following ultimate findings of fact made by the court justifying the termination of her parental rights, which are set forth respectively as respondent's second, fourth, and third assignments of error:

3. That the minor child, Kayla Destiny Greene, has been abused by her mother, Dawn Marie Hook Greene, as defined by G.S. 7B-101(1) by the mother creating a substantial risk of serious physical injury to the minor child by other than accidental means by fabricating medical problems with the minor child, and subjecting the minor child to medical procedures, medications, and surgeries; further, the substantial risk of serious physical injury is most likely to continue because of the Respondent mother's lack of following through with any of her treatment plans; that this creates a strong likelihood that abuse would continue and has continued through the time of [the] hearing.

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4. That the Respondent mother has willfully left the minor child in foster care for more that twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made within twelve months in correcting those conditions which led to the removal of the minor child. That there is some evidence that the Respondent mother made progress in her individual therapy, but there is substantial evidence to show that this progress was only minimal and that none of the conditions were corrected which led to the removal of the minor child.

5. That based on the totality of the evidence received . . . , the [trial] Court finds that the Respondent mother did seek services for her problem of [MSBP] until December, 1999; at that time, the treatment was stopped by the Respondent mother who had not reached any of her goals or any of her objectives on any issue; that the Respondent mother sought no further treatment; that there is a great likelihood that mental health issues will continue such that the Respondent mother is incapable of providing for the proper care and supervision of her minor child, such that the minor child is a dependent juvenile as defined by N.C.G.S. 7B-101, and there is a reasonable probability that such incapability will continue for the foreseeable future.

These ultimate findings of fact provide three separate grounds for terminating respondent's parental rights: Finding of Fact 3 represents grounds based on abuse pursuant to Section 7B-1111(a)(1); Finding of Fact 4 represents grounds based on respondent's inability to provide for the child's proper care and supervision pursuant to Section 7B-1111(a)(6); and Finding of Fact 5 represents grounds based on respondent's willfully leaving the child in foster care pursuant to Section 7B-1111(a)(2). However, this Court has held that "[a] valid finding on one statutorily enumerated ground is sufficient to support an order terminating parental rights." *In re Stewart Children*, 82 N.C. App. 651, 655, 347 S.E.2d 495, 498 (1986) (citing *In re Pierce*, 67 N.C. App. 257, 312 S.E.2d 900 (1984)). Therefore, even though we find there is clear, cogent, and convincing evidence to support termination based on each of the statutory grounds provided by the trial court, we need only address one of respondent's assignments of error challenging the sufficiency of the evidence. *See id.*

In part, an "abused juvenile" is defined as "[a]ny juvenile less than 18 years of age whose parent . . . [c]reates or allows to be created a substantial risk of serious physical injury to the juvenile by other than

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accidental means[.]” N.C. Gen. Stat. § 7B-101(1)(b) (2001). Section 7B-1111(a)(1) of our statutes allows a court to terminate parental rights upon a finding that the parent has abused his or her child in accordance with the definition. *See* § 7B-1111(a)(1). In reaching this conclusion, the trial court must admit and consider all evidence of relevant circumstances or events which existed or occurred before the adjudication of abuse, as well as any evidence of changed conditions in light of the evidence of prior abuse and the probability of a repetition of that abuse. *In re Beck*, 109 N.C. App. 539, 545, 428 S.E.2d 232, 236 (1993) (citing *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)). “The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*. . . .” *Id.* (Emphasis in the original.)

Here, the record provides overwhelming evidence that respondent’s intentional actions created a substantial risk of serious physical injury to her child. Evidence was offered that during the two years prior to Kayla being removed from respondent’s home, respondent subjected the child to 25 different emergency room visits, 60 office visits to pediatricians, 143 prescriptions, and 8 admissions to the hospital. After the child was taken from her, respondent made no substantial improvements to correct the conditions that led to Kayla being removed from her care and custody despite reunification efforts by DSS. Respondent continuously failed to comply with a court order preventing her from providing child care services to other minor children while unsupervised and caring for animals in her home. Although respondent attended numerous therapy sessions and underwent treatment for MSBP, she continued to display the attention-seeking behaviors associated with this disorder by: (1) being inappropriately dressed without undergarments so as to show others her private parts; (2) being loud, boisterous, and threatening in public places; (3) calling “911” after receiving a superficial laceration on her forearm that was not even bleeding; (4) obtaining tattoos and a tongue piercing when these actions were prohibited by her treatment program; and (5) admitting herself to a psychiatric hospital for depression and suicidal tendencies. The evidence offered further showed that respondent stopped her therapy sessions and treatment after making only minimal progress, but before meeting any of her goals or objectives. Respondent offered little to no evidence to dispute these findings. Therefore, we cannot conclude that the trial court did not have sufficient evidence to terminate respondent’s parental rights. Respondent’s failure to make any substantial

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change in the conditions that led to Kayla being taken from her care and custody signify a strong probability of a repetition of abusive behavior.

II.

[2] The second issue raised by respondent (as her sixth assignment of error) is whether the trial court erred in concluding at the disposition stage that it was in Kayla's best interests to terminate respondent's parental rights. Our statutes provide that even when the trial court finds one or more grounds exist authorizing the termination of those rights, the court shall not issue an order terminating parental rights if it would not be in the best interests of the child. *See* § 7B-1110(a). Respondent has failed to meet her burden of showing error.

The 119 findings of facts contained in the order terminating respondent's parental rights demonstrate that the trial court thoroughly considered what would be in the best interests of Kayla. Aside from making findings of fact regarding instances of prior abuse and the probability of its repetition, the court also made findings with respect to the child's progress since being removed from respondent's home. Some of these findings include:

103. That since being placed in foster care, over a three year period, the minor child went to a pediatrician on nine occasions; three of the occasions were for foster care wellness checks; two of the occasions were for followup visits for bronchitis and an ear problem that were cleared with antibiotics at the doctor's office; that the minor child, over a three year period, had no fevers, no complaints, no hospital or ER admissions, no surgeries, and no accidents or injuries which required medical attention.

104. That the minor child, when originally placed in foster care, did request doctor visits and medical care when she would scrape herself or have minor injuries; that the foster parent would redirect the minor child, attend to the injury, and avoid any unnecessary medical interaction.

....

107. That the minor child did have initial problems when separated from her parents; that she has been in therapy for adjustment disorder and stress which has caused mixed emotional conflict.

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113. That during in-home therapy and following in-home therapy at supervised visitation, [the child's therapist] observed that the minor child had no problem disengaging from her mother after the visitation and going without incident back to foster care; that this was unusual for a child of her age.

. . . .

115. That since June, 2000, Michelle Coggins, Social Worker for the minor child, has made regular visits with the minor child in her new foster home; that the child has bonded with her foster parents and gets along well with other children in the home; that the child is age appropriate in her development and interaction with other children.

. . . .

116. That since being in her regular foster placement, the minor child has missed only one day of school and has had no medical problems.

Based on the foregoing findings, coupled with the evidence discussed previously in this opinion establishing prior abuse and the probability of its repetition, we cannot find that the trial court erred in concluding that it was in the child's best interest to terminate respondent's parental rights.

III.

[3] The final issue presented to this Court (as respondent's seventh assignment of error) is whether the trial court erred in excluding from evidence certain documentation contained within the records maintained by DSS. We find no error.

Section 7B-2901(b) of our statutes provides that:

The Director of the Department of Social Services shall maintain a record of the cases of juveniles under protective custody by the Department or under placement by the court, which shall include family background information The records maintained pursuant to this subsection may be examined only by order of the court except that the guardian ad litem, or juvenile, shall have the right to examine them.

§ 7B-2901(b). If a party other than the guardian ad litem or the juvenile contends that the records are relevant to an action and moves to discover those records:

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A judge is required to order an *in camera* inspection and make findings of fact concerning the evidence at issue only if there is a possibility that such evidence might be material . . . and favorable to [that party]. However, if after the judge examines the evidence he rules against the [party's] discovery motion, the judge should order the records sealed for appellate review.

State v. Phillips, 328 N.C. 1, 18, 399 S.E.2d 293, 301 (1991) (citation omitted).

In the present case, respondent requested the trial court grant her access to certain documentation in DSS' records. After hearing arguments from both parties, the court did an *in camera* inspection of every page of the records. Once the court completed its review, it turned over only those documents that were deemed relevant and material, sealing the remainder for appellate review. We have reviewed these sealed documents and find that many of them simply reiterate the findings of fact made by the court based on other evidence or testimony provided during the hearing. Any new information noted in the documents does not negate the multitude of findings supporting termination of respondent's parental rights or cause this Court to question the trial court's decision that termination was in the child's best interests. Thus, we conclude that the documents excluded by the court shed no light on respondent's ability to care for and retain her parental rights with respect to the minor child.

Accordingly, for the aforementioned reasons, we conclude that there was clear, cogent, and convincing evidence of grounds for the trial court's termination of respondent's parental rights to Kayla and that it was in the minor child's best interests to do so. Moreover, the trial court did not commit reversible error by excluding certain documentation from evidence that respondent's counsel deemed relevant to the case.

Affirmed.

Judges WYNN and HUDSON concur.

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[152 N.C. App. 421 (2002)]

LOLITTA HUNT CAPLE, AND HUSBAND, LUTHER R. CAPLE, JR., PLAINTIFFS v. BULLARD RESTAURANTS, INC., d/b/a BURGER KING, TAR HEEL, INC. d/b/a BURGER KING, CLIFFORD BULLARD, JR., AND WAYNE FIELDS, DEFENDANTS

No. COA01-906

(Filed 20 August 2002)

Workers' Compensation— exclusivity—injury arising from employment—restaurant manager robbed and beaten

Plaintiff's claims are barred by the exclusivity provisions of the Workers' Compensation Act where plaintiff worked as a restaurant night manager, suffered post traumatic stress syndrome after being beaten and robbed by a co-employee, and brought a civil action based on defendant's alleged failure to investigate the co-employee's background before hiring him. Contrary to plaintiff's contention, a binding Form 21 agreement acknowledged that the injury did arise from plaintiff's employment. Moreover, plaintiff's action was not allowed under *Woodson v. Rowland*, 329 N.C. 330 (1991), and while plaintiff contended that being attacked by a co-employee was not an expected incident of her employment, robbery is a general risk of counting money at a business at closing time.

Appeal by plaintiffs from judgment entered 29 January 2001 by Judge D. Jack Hooks, Jr., in Scotland County Superior Court. Heard in the Court of Appeals 24 April 2002.

Puryear and Lingle, P.L.L.C., by David B. Puryear, Jr.; and Hayes Hofler & Associates, P.A., by R. Hayes Hofler, for plaintiff appellants.

Moreau, Marks & Gavigan, PLLC, by W. Timothy Moreau; Etheridge, Moser, Garner & Bruner, by Terry R. Garner; and Cranfill, Sumner & Hartzog, L.L.P., by Samuel H. Poole, Jr., for defendant appellees.

McCULLOUGH, Judge.

Plaintiffs Lolitta Hunt Caple and Luther R. Caple, Jr., appeal from an order granting summary judgment in favor of defendants Bullard Restaurants, Inc., d/b/a Burger King, Tar Heel, Inc., d/b/a Burger King and Clifford Bullard, Jr., entered 29 January 2001 by the Honorable D. Jack Hooks, Jr., during the 27 November 2000 Civil Session of Scotland County Superior Court.

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Plaintiff Lolitta Caple was the assistant manager of defendant Tar Heel, Inc.'s Burger King restaurant in Hamlet, North Carolina. On 14 May 1998, she was assigned by her supervisor to work as the night manager at defendant Bullard Restaurants, Inc.'s Laurinburg Burger King restaurant. The two defendant companies had interlocking ownership and management.

Defendant Wayne Fields worked at the Laurinburg restaurant as the night porter on 14 May 1998. The night porter at Burger King, among other things, was to safeguard fellow employees when the restaurant closed at night by making sure they left safely. When Fields was hired by defendant Bullard Restaurants, Inc., he indicated on his application that he had not been convicted, pled guilty, or pled no contest to any felony or misdemeanor other than a traffic violation in the past five years. Defendants did not perform a criminal record check, or for that matter verify anything else from Fields' application. Fields had in fact been convicted of several crimes within the previous five years, including breaking and entering, assault on a female, communicating threats, and injury to real property. Defendant Fields had also been convicted of second-degree murder in 1986.

Mrs. Caple's duties as night manager were to run the shift, do inventory, transfer the money from the registers to the safe after counting it, and make sure that all was ready for the morning shift. The night manager was not to leave the restaurant until the night porter arrived.

Fields arrived at the restaurant on 14 May 1998 after plaintiff had finished counting the money and putting it in the safe. After the last of the employees left, plaintiff and Fields were the only ones still in the restaurant. Fields then assaulted her from behind with a pipe wrench. He demanded that she open the safe. When she could not, he threatened to kill her. Then, he tied her up and attempted to open the safe. Fields ended up stealing the safe instead of getting it open. Plaintiff eventually escaped and was found by police in the area. Fields was apprehended and convicted of robbery, assault, and various other crimes arising out of the incident.

Mrs. Caple signed a Form 21 Agreement for Workers' Compensation Benefits on 25 May 1998. This form represents the agreement between Mrs. Caple and Bullard's workers' compensation carrier that she "sustained an injury by accident . . . arising out of and in the course of employment on or by May 14, 1998." The injuries resulting from the assault by Fields were listed as to her "wrist, ankle,

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and scapular contusion, psychological.” Mrs. Caple has received workers’ compensation payments beginning in May of 1998 to the present, as well as payment for all of her medical bills as required under the act.

Nevertheless, Mrs. Caple filed this civil suit against defendants on 22 October 1998. The complaint alleges that Mrs. Caple suffers from “severe post traumatic stress syndrome and depression. She is unable to eat, sleep, work, relax, leave her home, or function at any reasonable level.” The complaint asserts several theories of recovery, including negligence as to Bullard Restaurants and Clifford Bullard’s hiring of Fields, negligent infliction of emotional distress, intentional infliction of emotional distress as to Bullard Restaurants, Clifford Bullard, and Fields; breach of contract as to Bullard Restaurants, Inc., Tar Heel, Inc., assault and battery and false imprisonment as to Fields, and a loss of consortium claim by her husband. In her negligence claim, she alleges that she “continues to suffer decreased earning capacity[.]” The crux of the complaint was that there was no investigation into Fields’ application before he was hired to assist in the protection of his fellow employees.

Defendants Bullard Restaurants, Inc., Tar Heel, Inc., and Clifford Bullard, Jr., made their motion for summary judgment on 8 May 2000. Evidence from discovery tended to show that during the three weeks that Fields worked before the assault and robbery, he did nothing to alert anyone as to his violent tendencies, or that he was a safety risk. The evidence also showed that the hiring practices used with Fields were the practices used in hiring all other employees. Bullard Restaurants had no actual knowledge of Fields’ criminal history, and no indication of it through his conduct at work. However, evidence for plaintiff revealed that Fields’ application showed unusual gaps for a 41-year-old man and that defendants violated its own practices as well as industry practices in failing to verify any information in the Fields application. Had they checked with Fields’ last employer, they would have found that he had been fired and became violent. That would have mandated a criminal record check.

After a hearing, Judge Hooks found that there was no genuine issue as to any material fact and granted summary judgment to defendants, except for Fields, who had a default judgment entered against him. Plaintiffs appeal from this order.

The plaintiffs’ sole assignment of error is that the trial court erred in granting defendant’s motion for summary judgment.

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I.

The main issue at the trial court and on appeal is whether the claims are barred by the exclusivity provisions of the Workers' Compensation Act which turns on whether the injuries suffered by plaintiff are covered by the Workers' Compensation Act.

N.C. Gen. Stat. § 97-10.1 states that:

If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents . . . shall exclude all other rights and remedies of the employee, his dependents . . . as against the employer at common law or otherwise on account of such injury or death.

N.C. Gen. Stat. § 97-10.1 (2001). "In order for an injury to be compensable under the Workers' Compensation Act, a claimant must prove: '(1) [t]hat the injury was caused by an accident; (2) that the injury arose out of the employment; and (3) that the injury was sustained in the course of employment.'" *Wake County Hosp. Sys. v. Safety Nat. Casualty Corp.*, 127 N.C. App. 33, 38, 487 S.E.2d 789, 792, *disc. review denied*, 347 N.C. 410, 494 S.E.2d 600 (1997) (quoting *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)).

Plaintiffs' main contention is that the emotional injuries suffered by her as a result of the assault by her co-employee did not arise out of her employment and thus are not covered under the Workers' Compensation Act.

Initially, we note that there is significance to the fact that plaintiff and defendants' workers' compensation carrier signed a Form 21 Agreement for Workers' Compensation Benefits months in advance of filing her civil suit. The Commission approved the agreement on 22 December 1999. At this point, the agreement became binding on the parties and assumed the force and effect of a ruling by the Industrial Commission. *See Clark v. Sanger Clinic, P.A.*, 142 N.C. App. 350, 542 S.E.2d 668, *disc. review denied*, 353 N.C. 450, 548 S.E.2d 524 (2001); *Pruitt v. Publishing Co.*, 289 N.C. 254, 221 S.E.2d 355 (1976); N.C. Gen. Stat. § 97-17 (2001). These cases stand for the proposition that, once approved, a Form 21 "becomes an award enforceable, if necessary, by a court decree." *Pruitt*, 289 N.C. at 258, 221 S.E.2d at 358.

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In *Clark*, an employee was contesting as incorrect the rate agreed to in the Form 21 Agreement that she had signed and the Industrial Commission had approved. The *Clark* Court noted that the employee had not properly preserved the right to challenge her rate of compensation. In so holding, this Court said that once a Form 21 Agreement is approved, "neither party was in a position to challenge any provision of the agreement, 'unless it [was] made to appear to the satisfaction of the Commission 'that there [had] been error due to fraud, misrepresentation, undue influence or mutual mistake.''" *Clark*, 142 N.C. App. at 353, 542 S.E.2d at 671 (quoting *Pruitt*, 289 N.C. at 259, 221 S.E.2d at 358) (quoting *Neal v. Clary*, 259 N.C. 163, 130 S.E.2d 39 (1963)). In addition, the claimant in *Clark* had collected the compensation for almost a year before she requested a hearing on her request for yearly increases in compensation. The employee in *Clark* therefore remained "bound by the agreement and, due to her conduct, . . . waived any right to challenge the compensation received thereunder." *Id.* at 354, 542 S.E.2d at 671.

The Form 21 Agreement approved in the present case acknowledges that the injury suffered by Mrs. Caple was a compensable injury, in that it was an "injury by accident . . . arising out of and in the course of employment on or by May 14, 1998." (Emphasis added.) Plaintiff began receiving compensation in May of 1998 and has continued to do so up to the present. Plaintiff did not dispute the provisions of her agreement until around five months later when she filed her civil complaint. At no time has Mrs. Caple sought to have the Form 21 Agreement set aside for any of the reasons enumerated in § 97-17 (*i.e.*, fraud or misrepresentation). Therefore, Mrs. Caple is bound by her agreement in which it was stated that the injury arose out of the employment.

Plaintiff argues that *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991) allows her to pursue this civil action. We disagree. The Supreme Court in *Woodson* concluded that the plaintiff could simultaneously pursue a civil action against her employer and her workers' compensation claim "without being required to elect between them," although she was entitled to only one recovery. *Woodson*, 329 N.C. at 337, 407 S.E.2d at 226. This was so because her forecast of evidence tended to show that the death of the decedent "was the result of both an 'accident' under the [Workers' Compensation Act] and an intentional tort," and the exclusivity provisions do not "shield the employer from civil liability for an intentional tort." *Id.*

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We hold that when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act. Because . . . the injury or death caused by such misconduct is nonetheless the result of an accident under the Act, workers' compensation claims may also be pursued. There may, however, only be one recovery.

Woodson, 329 N.C. at 340-41, 407 S.E.2d at 228.

In *Woodson*, a workers' compensation claim had been filed, yet it had not been ruled upon because the claimant had "specifically requested that the Industrial Commission not hear her case until completion of [her civil action]." *Woodson*, 329 N.C. at 336, 407 S.E.2d at 226. It is not clear from *Woodson* that a claimant would be allowed to file a Form 21 Agreement with the Industrial Commission and begin to receive compensation, while still being entitled to file a civil action for the same injury. What is clear is that only one recovery may be had, and in the present case, plaintiff has been receiving benefits.

Plaintiff correctly points out that receiving benefits does not bar a suit by the employee for claims which rightfully fall outside the scope of the Workers' Compensation Act. Thus, we discuss whether that is the case here.

As to the applicability of the Workers' Compensation Act to the present facts, plaintiff asserts that her work as an assistant manager of the restaurant did not create a risk that she would be attacked by a co-employee as an expected incident of her employment. We believe that *Wake County Hosp. Sys.*, 127 N.C. App. 33, 487 S.E.2d 789, controls the outcome here. That case states:

In North Carolina, courts have consistently held that an intentional assault in the work place by a fellow employee or third party is an accident that occurs in the course of employment, but does not arise out of the employment unless a job-related motivation or some other causal relation between the job and the assault exists.

Id. at 39, 487 S.E.2d at 792. In *Gallimore*, 292 N.C. at 404, 233 S.E.2d at 532-33, our Supreme Court discussed this causal relation:

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[T]he controlling test of whether an injury "arises out of" the employment is whether the injury is a natural and probable consequence of the nature of the employment. A contributing proximate cause of the injury must be a risk to which the employee is exposed because of the nature of the employment. This risk must be such that it "might have been contemplated by a reasonable person familiar with the whole situation as incidental to the service when he entered the employment. The test 'excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. . . .'" In other words, the "causative danger must be peculiar to the work and not common to the neighborhood. . . ."

Id. (citations omitted).

The causal relationship in the *Wake County Hosp. Sys.* case was supported by the facts that the employee was "abducted from the employee parking lot, she was assaulted and killed on an adjacent street, she was carrying work materials, and the assailant was a co-employee." *Wake County Hosp. Sys.*, 127 N.C. App. at 39, 487 S.E.2d at 792. Relying on *Culpepper v. Fairfield Sapphire Valley*, 93 N.C. App. 242, 377 S.E.2d 777, *aff'd*, 325 N.C. 702, 386 S.E.2d 174 (1989), which stated that "course of employment" included the employer's premises and may extend to adjacent premises or roads, this Court in *Wake County Hosp. Sys.* found that the facts were sufficient to show a causal relationship between the employee's employment and her death, and thus would be compensable under the Workers' Compensation Act. *Wake County Hosp. Sys.*, 127 N.C. App. at 39-40, 487 S.E.2d at 792-93.

Regardless, the claimant in that case made the argument that the employee could still maintain a civil action for negligent hiring and retention against the hospital. *Id.* at 40, 487 S.E.2d at 793. This Court noted that the remedies afforded by the act were exclusive per N.C. Gen. Stat. § 97-10.1, precluding claims for ordinary or willful and wanton negligence, but that there was an exception under the *Woodson* case for injuries that were the result of intentional conduct which the employer knew was substantially certain to cause serious injury or death. The Court stated, "[e]mployees have not been permitted to recover damages from an employer in a *Woodson* claim for injury or death resulting from negligent hiring or retention." *Id.* The Court continued:

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Here, the only allegations contained in the complaint . . . that could possibly be construed as asserting a *Woodson* claim were that the Hospital hired a laundry employee with a relatively minor criminal record, and failed to fire that employee even though it had knowledge that he had engaged in sexual relations with other hospital employees at work, knew he had a violent temper, and had knowledge of his alleged but unproven altercations with female co-employees in which no one was injured. Though these allegations may be sufficient to allege that the Hospital was negligent in hiring and retaining [assailant], the allegations are insufficient to allege conduct on the part of the Hospital substantially certain to cause injury or death and, therefore, do not meet the stringent requirements of *Woodson*. Without a *Woodson* claim, workers' compensation is the only remedy available in this case; any other action is barred as a matter of law.

Wake County Hosp. Sys., 127 N.C. App. at 40-41, 487 S.E.2d at 793.

The facts in the present case clearly fall within the realm of the *Wake County Hosp. Sys.* Indeed, they fit it much better. Contrary to plaintiffs' contention, the facts show that the injury to Mrs. Caple arose out of her employment because of the causal relation between her job and the assaultive conduct. She was the night manager. Her duties as such were, among others, to take the money out of the registers, count it, and then put it into the safe. Usually most of the employees would be gone at this time, save the night porter. It is certain that getting robbed was a risk that " 'might have been contemplated by a reasonable person familiar with the whole situation as incidental to the service[.]' " *Gallimore*, 292 N.C. at 404, 233 S.E.2d at 532-33.

Her allegations also fail to support a *Woodson* claim. She alleges that defendants failed to investigate Fields' application, and as a result he assaulted her during the robbery causing her severe emotional distress. As in *Wake County Hosp. Sys.*, such conduct, at best, only shows that defendants were negligent in hiring and retaining Fields. It would still be insufficient to allege "conduct on the part of [defendants] substantially certain to cause injury or death and, therefore, [does] not meet the stringent requirements of *Woodson*." *Wake County Hosp. Sys.*, 127 N.C. App. at 41, 487 S.E.2d at 793. Defendants had no indication during the three weeks of Fields' employment that he would commit such a crime. See *Stanley v. Brooks*, 112 N.C. App. 609, 436 S.E.2d 272 (1993), *disc. review denied*, 335 N.C. 772, 442 S.E.2d 521 (1994) (Employers generally have no duty to perform

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criminal record checks and a presumption exists that an employer uses due care in hiring its employees.).

Plaintiffs next argue that *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140-41 (1986), stands for the proposition that negligent hiring by an employer resulting in emotional injury is not covered under the Workers' Compensation Act and thus dictates a different result in the case *sub judice*. In that case this Court stated:

Although the Act eliminated negligence as a basis of recovery against an employer, the Act covers only those injuries which arise out of and in the course of employment. An injury arises out of the employment "when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so there is some causal relation between the injury and the performance of some service of the employment."

The emotional injury allegedly suffered by [plaintiff], resulting from [co-employee's] sexual harassment, [was not] a "natural and probable consequence or incident of the employment."

Hogan, 79 N.C. App. at 496, 340 S.E.2d at 124.

Plaintiffs rely on *Hogan* for the proposition that negligent hiring by an employer resulting in emotional injury is not covered under the Act. While emotional damage might not be a natural or probable consequence of working at a fast food restaurant, robbery is a risk that is incidental to the service of a night manager who counts money before placing it in a safe. The night porter was hired to attempt to reduce just such a risk. The act does cover emotional distress if it is a natural consequence of the job, as in the case of a police officer suffering from depression or post-traumatic stress disorder from the rigors of his job. See *Pulley v. City of Durham*, 121 N.C. App. 688, 468 S.E.2d 506 (1996). Further, in *Jordan v. Central Piedmont College*, 124 N.C. App. 112, 476 S.E.2d 410 (1996), *disc. review denied*, 345 N.C. 753, 485 S.E.2d 53 (1997), this Court held that mental injuries are compensable under the Workers' Compensation Act, the same as physical injuries so long as the injury meets the statutory requirements. *Jordan*, 124 N.C. App. at 118-19, 476 S.E.2d at 413-14.

Plaintiffs' argument perverts the natural consequence/causal relation requirement of the "arising out of the employment" test. *Hogan* held that "[s]exual harassment is not a risk to which an employee is exposed because of the nature of the employment but is a risk to

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which the employee could be equally exposed outside the employment." *Hogan*, 79 N.C. App. at 496, 340 S.E.2d at 124. Basically, no one takes a job expecting to be sexually harassed. However, robbery is a general risk when you count money at a business at closing time.

For the reasons set forth above, the ruling of the trial court is

Affirmed.

Judges TIMMONS-GOODSON and BIGGS concur.

NORTH CAROLINA DEPARTMENT OF CORRECTION, PETITIONER-APPELLEE V.
CONNIE BRUNSON, RESPONDENT-APPELLANT

No. COA01-793

(Filed 20 August 2002)

Public Officers and Employees— termination of state employee—contempt of court—personal misconduct

The trial court did not err by reversing the State Personnel Commission's conclusions that respondent state employee's dismissal for personal misconduct was inappropriate based on the fact that her conduct was not contemptuous and was not unacceptable personal conduct, because: (1) the Department of Corrections's Personnel Manual lists being found in contempt of court as an example of unacceptable conduct, and even though a magistrate later tore up the order of contempt and never filed it with the clerk, a judgment finding respondent in contempt of court was entered when the magistrate told respondent in open court that he was finding her in contempt; (2) the magistrate's suspension of the order after learning there was no place available in the county jail to detain respondent for the entire sentence of forty-eight hours does not negate the final nature of the contempt finding; and (3) respondent's conduct underlying the finding of contempt was unacceptable personal conduct under N.C. Admin. Code tit. 25, r. 1J.0614(b) rather than unsatisfactory job performance under N.C. Admin. Code tit. 25, r. 1J.0604(b).

Appeal by respondent from order entered 10 January 2001 by Judge David Q. LaBarre in Durham County Superior Court. Heard in the Court of Appeals 18 April 2002.

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[152 N.C. App. 430 (2002)]

Attorney General Roy A. Cooper, III, by Assistant Attorney General J. Philip Allen, for petitioner-appellee.

Browne, Flebotte, Wilson & Horn, P.L.L.C., by Joy Rhyne Webb, for respondent-appellant.

MARTIN, Judge.

Respondent Connie Brunson was terminated from her position as an Intensive Case Officer with the Division of Community Corrections of the North Carolina Department of Corrections (Department) effective 30 April 1999, for alleged unacceptable personal conduct. She petitioned for a contested case hearing.

Evidence before the administrative law judge (ALJ) at the contested case hearing consisted of the testimony of several witnesses as well as numerous exhibits, which included written statements by the witnesses as well as other documentary evidence. The evidence tended to show that the incident giving rise to respondent's dismissal occurred in the Durham County Magistrate's Office on 14 January 1999. Respondent was in the magistrate's office, processing one of her probationers for a probation violation. When respondent entered the office, Durham Police Officer K.L. Johnson was seated in front of one of the magistrate's windows on the right hand side. No one was seated in front of the left window, so respondent instructed her probationer to sit on the stool in front of the left window. There were considerable contradictions in the evidence as to what occurred thereafter.

In his testimony at the administrative hearing and in his written statement, Officer Johnson stated that respondent was talking loudly when she entered the magistrate's office. Officer Johnson was waiting to do business with the magistrate when respondent got in front of him in line and placed her papers into the magistrate's window. Officer Johnson advised respondent that he had been waiting and was ahead of her in the line; according to Officer Johnson, respondent said, " 'So, I got it like that, I've been here 15 years and I can do that.' " At that point, Magistrate Robinson and Magistrate VanVleet entered the processing room and Magistrate VanVleet sat down behind the window at which Officer Johnson had been waiting. Respondent began talking loudly to the probationer in her custody about his attire and his haircut; she then turned and began poking Officer Johnson on the left arm. Magistrate VanVleet instructed respondent to be quiet and to stand with her client. Respondent then

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stated “ ‘who does he think he is? . . . he must know who I am.’ ” While Officer Johnson was providing information to the magistrate, respondent poked his arm again and Officer Johnson advised respondent that if she struck him again, he would charge her with assault on an officer. Magistrate VanVleet told respondent to go to the other side of the room because she was being disruptive. Respondent and the magistrate had words and Magistrate VanVleet told her “ ‘one more word and you are in contempt of this court.’ ” According to Officer Johnson, respondent walked to the other side of the room and asked Magistrate Robinson, “ ‘who is that, he must not know me, he must be new’ ” At that point, Magistrate VanVleet told respondent that he was finding her in contempt of court and ordered that she be taken into custody.

In his written statement and in his testimony before the ALJ, Magistrate VanVleet related that as he was beginning his probable cause proceeding with Officer Johnson, respondent and Officer Johnson were talking and he observed respondent poke Officer Johnson's shoulder. Magistrate VanVleet instructed both respondent and the officer that he was beginning the proceeding; Officer Johnson then ceased the conversation and began presenting his case to the magistrate, but respondent continued to speak in a loud and boisterous tone. Magistrate VanVleet stopped the probable cause hearing because he could not hear Officer Johnson. Upon learning that respondent was a probation officer, Magistrate VanVleet told respondent that she was to stand away from his window, and not to come to his window again. Magistrate VanVleet continued the probable cause hearing but had to stop the hearing again when respondent made statements directed toward his window. At that point, Magistrate VanVleet advised respondent that if she did not quiet down, he would hold her in contempt. Magistrate VanVleet resumed the hearing with Officer Johnson but after a few minutes had passed, respondent leaned into his window, partially blocking his view of Officer Johnson. At that point, the magistrate told respondent that she was being held in contempt and ordered that she be taken into custody. The accounts of Officer Johnson and Magistrate VanVleet were corroborated by the testimony of Officer David Diogo, who was also present in the magistrate's office.

Respondent testified that after she entered the Magistrate's office, she and Officer Johnson “began to talk and laugh and joke and tease with one another.” Respondent stated that she then did business with Magistrate Stephanie Robinson. According to respondent, she

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heard Officer Johnson, jokingly, she thought, state, “ ‘Why is she being waited on first?’ ” Respondent then jokingly responded, “ ‘Because I have seniority. I’ve been here 15 years.’ ” Respondent proceeded with her business with Magistrate Robinson but later heard someone yelling out to be quiet and to “step back from the window or you’ll be held in contempt of court.” Respondent finished conducting her business with Magistrate Robinson and then looked to see who was yelling. At that point, Magistrate VanVleet threw up his hands and said, “ ‘That’s it. You’re held in contempt of court.’ ” According to respondent, she still did not realize that he was talking to her. As she was beginning to leave, Corporal Ray, who was also present in the magistrate’s office, informed her that she had been held in contempt of court.

Corporal Ray testified that he observed respondent and Officer Johnson joking with each other. He further testified that he was under the impression that respondent did not realize that Magistrate VanVleet was talking to her or that she did not hear him tell her to step away from the window. Additionally, Corporal Ray thought that respondent had not heard Magistrate VanVleet hold her in contempt of court.

In his written order finding respondent in contempt, a copy of which is in the record, Magistrate VanVleet ordered that she be held in the Durham County jail for 48 hours. Magistrate VanVleet testified that, after conversing with the Chief District Court Judge for Durham County and being advised that there was no place to hold respondent, he “suspended” the contempt order and released respondent after she apologized for her conduct. Respondent testified that Magistrate VanVleet tore up the contempt order in her presence.

On 11 April 2000, the ALJ filed a recommended decision in which he concluded that the Department lacked just cause to dismiss respondent and recommended that she be reinstated with back pay, costs, and attorney’s fees. The ALJ concluded that though respondent’s conduct was such as to constitute unsatisfactory job performance, it did not rise to the level of unacceptable personal conduct so as to be grounds for termination without prior warning. Accordingly, the ALJ found the Department did not have just cause to terminate respondent, since she had not received the requisite written warnings required for termination for unsatisfactory job performance. On 1 September 2000, the State Personnel Commission (Commission) adopted the ALJ’s recommended findings of fact, conclusions of law,

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and decision. The Department petitioned for judicial review of the Commission's decision.

In an order entered 10 January 2001, the superior court determined that the Commission's decision was erroneous as a matter of law. The superior court reversed the decision of the Commission and remanded the matter with instructions to the Commission to reinstate and affirm the decision of the Department to dismiss respondent from employment. Respondent appeals.

Upon an appeal from an order of the superior court entered after review of an agency decision, "the appellate court examines the trial court's order for error of law . . . [by] (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *ACT-UP Triangle v. Comm'n for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citation omitted). The appropriate scope of review of the agency to be utilized by the superior court depends on the issues raised in the petition for judicial review. *Id.*

When the petitioner contends the agency decision was affected by an error of law, G.S. § 150B-51(b)(1)(2)(3) & (4), *de novo* review is the proper standard; if it is contended the agency decision was not supported by the evidence, G.S. § 150B-51(b)(5), or was arbitrary and capricious, G.S. § 150B-51(b)(6), the whole record test is the proper standard (citation omitted).

R.J. Reynolds Tobacco Co. v. North Carolina Dept. of Environment & Natural Resources, 148 N.C. App. 610, 614, 560 S.E.2d 163, 166, *disc. review denied*, 355 N.C. 493, 564 S.E.2d 44 (2002). It may be necessary for the reviewing court to employ both standards of review if warranted by the nature of the issues raised. *In re Appeal by McCrary*, 112 N.C. App. 161, 435 S.E.2d 359 (1993).

In its petition for judicial review in the superior court, the Department alleged that portions of the Commission's decision were either contrary to, or unsupported by, substantial evidence in the record; in addition, the Department alleged the decision was arbitrary and capricious and that the Commission had committed errors of law. Because the petition for judicial review raised issues of whether the agency decision was unsupported by the evidence (G.S. § 150B-51(b)(5)) or was arbitrary and capricious (G.S. § 150B-51(b)(6)), as well as issues of whether the decision was affected by errors of law (G.S. § 150B-51(b)(4)), both *de novo* review

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and whole record review were called for. *See McCrary*, 112 N.C. App. 161, 435 S.E.2d 359.

In its order reversing the Commission, the superior court explicitly adopted a *de novo* standard of review in reviewing the agency decision for error of law. The court wrote:

Since the gravamen of the petition surrounds alleged errors of law committed by the [ALJ] and the State Personnel Commission, both as to their contravening a judicial official's written order and as to their characterization of Respondent's conduct as not being unacceptable personal conduct, the reviewing Court adopted a *de novo* standard of review

The court went on to recite that it had reviewed "the entire administrative record, including the exhibits and the transcript of the hearing before the [ALJ]," before making extensive findings of fact. Respondent argues the trial court erred in making these findings and in replacing the Commission's findings regarding conflicting evidence with its own.

Respondent correctly argues that a reviewing court, when conducting a "whole record" review, may not substitute its own findings for those of the agency with regard to conflicts in the evidence, even though the trial court may have found differently from the agency. *Savings & Loan Assoc. v. Savings & Loan Comm.*, 43 N.C. App. 493, 259 S.E.2d 373 (1979). However, when the trial court is conducting *de novo* review to determine whether an agency decision was affected by error of law, this Court has recently observed that the trial court is required to "'consider a question anew, as if not considered or decided by the agency' previously (citation omitted) . . . [and] must make its own findings of fact and conclusions of law and cannot defer to the agency its duty to do so." *Jordan v. Civil Serv. Bd. of Charlotte*, 137 N.C. App. 575, 577, 528 S.E.2d 927, 929 (2000). Moreover, when conducting *de novo* review, the reviewing court may substitute its judgment for that of the agency. *Duke University Medical Center v. Bruton*, 134 N.C. App. 39, 42, 516 S.E.2d 633, 635 (1999).

In seeking review of the Commission's decision, the Department asserted the Commission committed an error of law in concluding that respondent's conduct constituted "unsatisfactory job performance" rather than "unacceptable personal conduct." Under the Commission's regulations, a state employee may be terminated from

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employment for “just cause.” “Just cause” may consist of either “unsatisfactory job performance” or “unacceptable personal conduct.” N.C. Admin. Code tit. 25, r. 1J.0604(b) (April 2002). “Unsatisfactory job performance” is defined as

[w]ork-related performance that fails to satisfactorily meet job requirements as specified in the relevant job description, work plan, or as directed by the management of the work unit or agency.

N.C. Admin. Code tit. 25, r. 1J.0614(j). “Unacceptable personal conduct” is defined, as applicable to the present case, as:

(1) conduct for which no reasonable person should expect to receive prior warning; or

...

(5) conduct unbecoming a state employee that is detrimental to state service[.]

N.C. Admin. Code tit. 25, r. 1J.0614(i). A State employee may be terminated for a single incident of “unacceptable personal conduct” without any prior disciplinary action while certain warnings are required for dismissals based on an employee’s “unsatisfactory job performance.” N.C. Admin. Code tit. 25, r. 1J.0608(a), r. 1J.0605(b). Regulations promulgated by the Commission have the force and effect of law, and an erroneous interpretation of such regulations by the Commission is an error of law, subject to *de novo* review. *Beauchesne v. Univ. of N.C. at Chapel Hill*, 125 N.C. App. 457, 462, 481 S.E.2d 685, 689 (1997).

In its findings of fact, the Commission found as a fact that respondent Brunson had been found in contempt of court by Magistrate VanVleet, and that after being detained for four hours, she apologized to the magistrate, who tore up the order. From this finding, the Commission concluded as a matter of law that respondent had not intentionally acted contemptuously toward the magistrate and that her actions did not rise to the level of unacceptable personal conduct. Upon review, the superior court determined the Commission’s conclusions that respondent’s conduct was not contemptuous and was not unacceptable personal conduct to be errors of law. We agree.

The Department’s Personnel Manual, in evidence in this case, lists, as an example of unacceptable personal conduct, “[a]s a repre-

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sentative of the Department, being found in contempt of court.” There is no question that respondent, under the Commission’s findings as well as those of the superior court, was found by Magistrate VanVleet to be in contempt of court. Respondent argues, however, that since the magistrate tore up the order of contempt and never filed it with the clerk, there was no final judgment of contempt entered. “Judgment is entered when sentence is pronounced.” N.C. Gen. Stat. § 15A-101(4a) (2002). In a criminal case, for entry of judgment to occur, a judge must either announce his ruling in open court or sign the judgment containing the ruling and file it with the clerk. *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984). In the case *sub judice*, the Commission and the trial court found that the magistrate had told respondent he was finding her in contempt, thereby announcing his ruling, in open court. Thus, a judgment finding respondent Brunson in contempt of court order was entered.

Nonetheless, respondent argues the contempt order was not final since Magistrate VanVleet tore it up upon her apology after she had been detained for approximately four hours. Magistrate VanVleet testified that he “suspended” the order after he had consulted with the Chief District Court Judge and had learned there was no place available in the county jail to detain respondent for the entire sentence of forty-eight hours. Magistrate VanVleet’s “suspension” of the sentence does not negate the final nature of the contempt finding. The trial court’s characterization of respondent’s apology as “purging” herself of contempt, which is not available in criminal contempt matters, *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988), while erroneous, is inconsequential to the court’s correct legal conclusion that Magistrate VanVleet’s order finding respondent in contempt was a final order of a judicial official.

Having determined that Magistrate VanVleet’s order finding respondent in contempt was a final order of a judicial official, we must also agree with the trial court’s legal conclusion that respondent’s conduct underlying the finding of contempt was unacceptable personal conduct rather than unsatisfactory job performance, and that the Commission’s conclusion to the contrary was an error of law. Being held in contempt of court as a representative of the Department is specifically listed in the North Carolina Department of Correction Personnel Manual as an example of personal misconduct, and is undeniably “conduct for which no reasonable person should expect to receive prior warning,” as well as “conduct unbecoming a state employee that is detrimental to state service.” N.C. Admin. Code tit.

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25, r. 1J.0614(i). Therefore, the Commission's decision reversing the Department's dismissal of respondent for personal misconduct was affected by error of law and the trial court's order reversing such decision will be affirmed.

Because we hold that the Commission's decision reversing the Department's dismissal of respondent from employment for unacceptable personal conduct was affected by error of law and must be reversed, we deem it unnecessary to review respondent's assignments of error relating to the trial court's failure to apply the whole record standard of review to the remaining grounds urged by the Department in its petition for judicial review.

Affirmed.

Judges TYSON and THOMAS concur.

JAMES MITCHELL LEARY, PLAINTIFF V. SUSAN MULLIS LEARY, DEFENDANT

No. COA01-1020

(Filed 20 August 2002)

1. Child Support, Custody, and Visitation— support—adjustment of gross income for benefit of company car

The trial court did not abuse its discretion in a child support case by imputing \$250 per month to plaintiff father's gross income based on the benefit of his company car, because: (1) the Child Support Guidelines stipulate that expense reimbursements or in-kind payments, such as a company car, received by a parent in the course of employment should be counted as income if they are significant and reduce personal living expenses; and (2) there is sufficient evidence to support the trial court's finding that plaintiff's benefit of an all-expense paid company vehicle was worth \$250 per month to him.

2. Child Support, Custody, and Visitation— support—request for deviation from guidelines

The trial court did not abuse its discretion in a child support case by denying plaintiff father's request for deviation from the Child Support Guidelines, because the trial court's findings as to

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the incomes of both parties and the presumptive reasonable needs of the children are supported by the evidence.

3. Costs— attorney fees—child support case

The trial court did not abuse its discretion in a child support case by awarding \$600 as reasonable attorney fees under N.C.G.S. § 50-13.6 to defendant mother, because: (1) there was sufficient evidence to support the trial court's finding of defendant's inability to defray the cost of this litigation; and (2) the trial court sufficiently found that plaintiff had refused to provide adequate child support.

Judge BIGGS concurring in part and dissenting in part.

Appeal by plaintiff from judgment entered 5 February 2001 by Judge N. Hunt Gwyn in Anson County District Court. Heard in the Court of Appeals 10 June 2002.

Henry T. Drake for plaintiff-appellant.

No brief filed by defendant-appellee.

WALKER, Judge.

Plaintiff and defendant were married on 25 November 1988 and were separated on 8 June 1998. There were two children born of the marriage. On 16 October 1998, plaintiff filed a complaint seeking custody, child support, divorce from bed and board, and equitable distribution. On 9 November 1998, defendant counterclaimed for post-separation support, permanent alimony, equitable distribution, and reasonable attorney's fees. On 20 October 2000, based upon his income and his perceived needs of the children, plaintiff petitioned the trial court to deviate from the North Carolina Child Support Guidelines (Guidelines). Both parties filed affidavits of financial standings with the trial court.

On 17 January 2001, the trial court heard evidence and arguments of counsel on the issues of child support and attorney's fees. All other matters were previously resolved through a consent order. The trial court issued an order, signed 5 February 2001 and filed 9 February 2001, which found the following in part:

8. That this Court has specifically reviewed the incomes of the parties, the expenses of the parties, and the reasonable needs of the minor children.

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9. That the Plaintiff has a gross monthly income from his employment with Leary Brothers Logging, Inc. of \$2,816.64; that the Court imputes to the Plaintiff as additional monthly income the sum of \$250.00 due to the fact that the Plaintiff has the use and benefit of a company vehicle pursuant to his employment, and based on the fact that the Plaintiff testified he has no personal vehicle and uses the Company vehicle for all driving; the Plaintiff's adjusted monthly adjusted gross income is \$3,066.64[.]

10. That the Defendant is employed by CMH Flooring in Wadesboro, North Carolina, and has a gross monthly income of \$1,733.32.

11. The Plaintiff carries health insurance on behalf of the minor children through his employment at Leary Brothers Logging, Inc., at no monthly expense to the Plaintiff.

12. That Plaintiff's and Defendant's combined gross monthly income, rounded to the nearest dollar is \$4,801.00. The basic support amount pursuant to the North Carolina Child Support Guidelines is \$997.00.

13. The Defendant pays for after school care and summer care for the minor children at Peachland Polkton after school program. Seventy-five percent of the Defendant's average monthly expense is \$108.00.

14. The Court, based upon the evidence presented, specifically declines to deviate from the North Carolina Child Support Guidelines in this case.

15. The Plaintiff earns sixty-three (63%) of the total combined support, and the Defendant earns thirty-seven (37%) of the total combined support.

16. The Plaintiff's share of monthly support to be paid to the Defendant for the use and benefit of the minor children is \$706.00 per month.

The trial court ordered the following in part:

1. The Plaintiff shall pay child support to the Defendant for the use and benefit of the minor children in the amount of \$706.00 per month. . . .

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3. The Plaintiff shall maintain health insurance on behalf of the minor children.

4. The Plaintiff shall be responsible to pay sixty-three percent of all uninsured medical and dental expenses incurred on behalf of the minor children. . . .

In response to defendant's request for reasonable attorney's fees, the trial court found and awarded the following in part:

17. The Defendant, since the entry of the Order on temporary custody and child support, has paid one-hundred percent of all day care costs and uninsured medical expenses incurred on behalf of the minor children.

18. The Defendant is still making monthly payments for at least two medical bills incurred by the children, with balances outstanding to date.

. . . .

20. The Defendant, based upon her payment of all uninsured medical expenses for the children for the past two years, and based upon the fact that at least two such bills have outstanding balances to be paid, does not have the means or ability to pay her reasonable attorney's fees.

21. The Plaintiff has the means and ability to pay the Defendant's attorney's fees for the establishment of permanent child support.

22. The Court finds that the sum of six hundred dollars (\$600.00) is a reasonable attorney's fee, and such amount shall be paid by the Plaintiff to attorney Donna B. Stepp at the rate of \$50.00 per month until paid in full. Such payment is to be made monthly to the Anson County Clerk of Superior Court for dispersal to Donna B. Stepp until \$600.00 is paid in full.

Plaintiff first assigns error to the award of child support. Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Under this standard of review, the trial court's ruling "will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.* In a case for child support, the trial court must make

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specific findings and conclusions. *Dishmon v. Dishmon*, 57 N.C. App. 657, 660, 292 S.E.2d 293, 295 (1982). The purpose of this requirement is to allow a reviewing court to determine from the record whether a judgment, and the legal conclusions which underlie it, represent a correct application of the law. *Id.* at 659, 292 S.E.2d 295.

[1] Plaintiff contends the facts, as found by the trial court, are not supported by competent evidence. Specifically, defendant contends that the trial court erred in imputing \$250.00 per month to plaintiff's gross income since he had the benefit of the company vehicle.

The Guidelines stipulate that "[e]xpense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business should be counted as income if they are significant and reduce personal living expenses. Such payments might include a company car. . . ." *N.C. Child Support Guidelines*, Annotated Rules of North Carolina 35 (2002). Here, the record indicates that the vehicle driven by plaintiff was owned by Leary Brothers Logging, Inc. (Leary Brothers). The record further shows that Leary Brothers pays for the vehicle's maintenance, insurance, and, according to plaintiff's testimony, "around three hundred dollars for gas" monthly. Thus, there is sufficient evidence to support the trial court's finding that plaintiff's benefit of an all expense paid company vehicle was worth \$250.00 per month to him.

[2] In addition, plaintiff contends the trial court failed to make proper findings upon his request for a deviation from the Guidelines. "Although section 50-13.4(c) and the Guidelines require findings of fact only when the trial court deviates from the Guidelines, effective appellate review also requires findings to support a denial of a party's request for deviation." *Buncombe County ex rel Blair v. Jackson*, 138 N.C. App. 284, 288, fn. 7, 531 S.E.2d 240, 243, fn. 7 (2000).

Here, the trial court made findings as to the incomes of both parties and the presumptive reasonable needs of the children. The trial court was presented with affidavits of financial standings from both parties. Plaintiff's affidavit reflected that the reasonable needs of the children to be \$765.00 per month. On the other hand, defendant's affidavit reflected the reasonable needs of the children were in excess of \$1,000.00 per month. The trial court specifically declined to deviate from the Guidelines, finding the presumptive support amount for the children to be \$997.00 per month. Plaintiff's share would be \$706.00 per month. Thus, the evidence supports the findings which in turn support the denial of the request for deviation from the Guidelines.

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[3] Plaintiff next contends that the trial court failed to make sufficient findings for the award of attorney's fees. The trial court is permitted to exercise considerable discretion in allowing or disallowing attorney's fees in child custody or support cases. *Brandon v. Brandon*, 10 N.C. App. 457, 463, 179 S.E.2d 177, 181 (1971). Generally, an award of attorney's fees will be stricken only if the award constitutes an abuse of discretion. *Clark v. Clark*, 301 N.C. 123, 136, 271 S.E.2d 58, 67 (1980). N.C. Gen. Stat. § 50-13.6 provides the following in part:

In an action or proceeding for the custody or support, or both, of a minor child, . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding.

Our Courts have interpreted this provision as requiring that the party seeking attorney's fees must allege and prove that it is an interested party acting in good faith and has insufficient means to defray the expenses. *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 723 (1980). A party has insufficient means to defray the expense of the suit when it is "unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit." *Id.* at 474, 263 S.E.2d at 725. If the action is for child support, there must be an additional finding that "the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution or proceeding." *Id.* at 472-73, 263 S.E.2d at 724. Whether these statutory requirements are met is a question of law, reviewable on appeal. *Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33, 35 (1996).

Plaintiff contends there was insufficient evidence to support the trial court's finding that defendant "does not have the means or ability to pay her reasonable attorney's fees." Based on defendant's evidence, the trial court found that she had been paying all of the uninsured medical expenses for the past two years, and she had outstanding balances on those expenses at the time of the hearing. We find there was sufficient evidence to support the trial court's finding of defendant's inability to defray the cost of this litigation.

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Plaintiff further contends the trial court erred in failing to find that he had refused to provide adequate support as required in order to support an award of attorney's fees in a child support case. The trial court found that the amount plaintiff had been providing, prior to the hearing, was inadequate to support the children and increased the award to \$706.00. Thus, the trial court sufficiently found that plaintiff had refused to provide adequate child support.

A careful review of the record reveals the trial court properly found that defendant was an interested party who had insufficient means to defray the cost of litigation and her request for attorney's fees was made in good faith. Thus, the trial court did not err in awarding \$600.00 as reasonable attorney's fees.

In conclusion, we find that the trial court's findings and conclusions are sufficient to support its award of child support and attorney's fees. The trial court did not err in denying plaintiff's request for deviation from the Guidelines.

Affirmed.

Chief Judge EAGLES concurs.

Judge BIGGS concurs in part and dissents in part.

BIGGS, Judge, concurring in part, dissenting in part.

While I agree with the majority that the trial court's finding of fact and conclusions of law are sufficient to support its award of child support, I disagree that the findings and conclusions are sufficient to support the award of attorney's fees.

As stated by the majority, N.C.G.S. § 50-13.6 requires that in child support actions there must be a finding of fact by the trial court "that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding." *Hudson v. Hudson*, 299 N.C. 465, 472-73, 263 S.E.2d 719, 724 (1980) (quoting N.C.G.S. § 50-13.6). "A finding of fact supported by competent evidence must be made on this issue . . . before attorney's fees may be awarded in a support suit." *Id.* Additionally, in *Gibson v. Gibson*, 68 N.C. App. 566, 575, 316 S.E.2d 99, 105 (1984), this Court held that the absence of a specific finding on this issue "compels us to vacate the award of attorney's

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fees and remand this case for additional findings as required by G.S. [§] 50-13.6.”

The trial court, in the case *sub judice*, made no finding of fact that plaintiff refused to provide adequate support. Nor is there a finding by the trial court, as suggested by the majority, “that the amount plaintiff had been providing, prior to the hearing, was inadequate to support the children.” The order makes no reference to the amount previously paid by plaintiff but merely sets the amount of support based on the Child Support Guidelines. Moreover, there was evidence at trial that plaintiff was paying the child support pursuant to a temporary support order.

Accordingly, I would vacate the award of attorney’s fees and remand the case for additional findings.



PRISCILLA M. FLOYD, PRISCILLA M. FLOYD, ADMINISTRATRIX OF THE ESTATE OF JAMES KENNETH FLOYD, DECEASED, AND CHRISTIAN ETHAN WALTER FLOYD, BY HIS GUARDIAN AD LITEM, ROBERT V. KNOTT, PLAINTIFFS V. INTEGON GENERAL INSURANCE CORPORATION, DEFENDANT

No. COA01-1072

(Filed 20 August 2002)

1. Insurance— automobile—simultaneous use of two vehicles—amount of coverage

The Financial Responsibility Act requires all motor vehicle liability policies to provide minimum liability coverages for each insured vehicle being “used” by the insured at the time of an accident, and the Act does not limit an insured’s “use” of insured vehicles to one at a time. N.C.G.S. § 20-279.21(b)(2).

2. Insurance— automobile—towing truck from ditch—use of both vehicles—double coverage

The amount of liability coverage provided by the insured’s policy for an accident that occurred when an oncoming vehicle struck insured’s car while the car blocked a lane of traffic as the insured attempted to pull his disabled truck from a ditch was the total of the per person and per accident coverages for each of insured’s two vehicles because (1) the insured was “using” the disabled truck as well as the car at the time of the accident even

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though the truck was not struck and was not then being driven or otherwise operated; and (2) there was a causal connection between insured's use of the disabled truck and the accident since insured's car would not have been parked across a lane of traffic and would not have been struck had the insured not been attempting to attach and tow the disabled truck.

Appeal by defendant from order entered 13 June 2001 by Judge William C. Gore, Jr., in Superior Court, Scotland County. Heard in the Court of Appeals 5 June 2002.

Gordon, Horne, Hicks and Floyd, P.A., by William P. Floyd, Jr., for the plaintiffs-appellees.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by A. David Bock, for the defendant-appellant.

WYNN, Judge.

This appeal presents us with two narrow questions of law: (1) Can an insured under a motor vehicle liability policy in North Carolina "use" more than one insured vehicle at a given time? and (2) Does North Carolina's Financial Responsibility Act, embodied in Article 9A of Chapter 20 in the General Statutes, N.C. Gen. Stat. §§ 20-279.1 *et seq.* (2001), prevent motor vehicle liability insurers from placing limits on their liability regardless of the number of insureds or insured vehicles involved, or the number of claims made? Based on our existing case law, we are compelled to conclude as a matter of law that: (1) an insured may "use" more than one insured motor vehicle at any given time, as that term is used in the Financial Responsibility Act, *see* N.C. Gen. Stat. § 20-279.21 (2001); and (2) the Financial Responsibility Act requires motor vehicle liability insurers to provide minimum liability coverages with respect to *each* insured motor vehicle designated in the policy, insuring against loss arising out of the "use" of such vehicles by the insured(s).

On 22 November 1996, Jerry McNeill was driving his 1977 GMC truck when it became disabled. He pushed the disabled truck completely off the roadway and into a small ditch along the shoulder of the southbound lane of the road. In the early evening of the following day, Mr. McNeill and his wife, Mary McNeill, returned to the disabled GMC truck, this time operating a 1973 Chevrolet. The McNeills then attempted to move the disabled GMC truck with the Chevrolet using a chain and steel pipe. In doing so, Mr. McNeill situated the Chevrolet

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across the southbound lane of traffic, and initially hooked the two vehicles together but the chain became unhooked from the GMC truck; he then attempted to back the Chevrolet closer to the GMC truck to re-attach it.

In the process of doing so, Mr. McNeill noticed vehicle headlights approaching in the distance in the southbound lane of travel; he therefore exited from the Chevrolet vehicle and walked with a flashlight toward the approaching headlights in an attempt to alert the approaching vehicle that the southbound lane was blocked by the Chevrolet vehicle.

James Kenneth Floyd drove the approaching vehicle, a 1983 Pontiac, in which his wife (Priscilla Floyd) and minor son (Christian Ethan Walter Floyd) rode as passengers. Despite Mr. McNeill's attempts to warn the Floyds, the Floyd vehicle collided in the southbound lane of the roadway with Mr. McNeill's Chevrolet, killing Mr. Floyd and injuring his wife and son.

At the time of the accident, both of the McNeill vehicles—the 1977 GMC truck and the 1973 Chevrolet—were specifically designated as insured vehicles under a motor vehicle liability policy issued by defendant-appellant Integon General Insurance Corporation to Mr. McNeill. The insurance policy provided for bodily injury liability up to \$25,000 per person and \$50,000 per accident. Additionally, the policy provided as follows:

The limit of liability shown in the Declarations for each person for Bodily Injury Liability Coverage is our maximum limit of liability for all damages for **bodily injury**, including damages for care, loss of services or death, sustained by any one person in any one auto accident. Subject to this limit for each person, the limit of liability shown in the Declarations for each accident for Bodily Injury Liability Coverage is our maximum limit of liability for all damages for **bodily injury** resulting from any one auto accident. . . . This is the most we will pay as a result of any one auto accident regardless of the number of:

1. Insured's
2. Claims made;
3. Vehicles or premiums shown in the Declarations, or
4. Vehicles involved in the auto accident.

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In September 1999, plaintiffs filed a declaratory judgment action seeking an adjudication of the parties' relative rights, liabilities and obligations. Plaintiffs contended that both the Chevrolet and the GMC truck were in "use" at the time of the accident, and accordingly requested that the trial court declare that the total amount of liability coverage provided by Integon's policy was \$50,000 per person and \$100,000 per accident, i.e. \$25,000 per person and \$50,000 per accident for *each* of the McNeills' insured vehicles. Defendant answered and the parties subsequently filed cross-motions for summary judgment, stipulating to all material facts.

On 13 June 2001, Superior Court Judge William C. Gore, Jr., entered an order denying defendant's summary judgment motion and granting summary judgment in favor of plaintiffs, declaring that Integon's policy provided coverage for the 23 November 1996 accident in the amount of \$25,000 per person and \$50,000 per accident for *each* of the McNeills' insured vehicles. Defendant appeals; we affirm.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" and that a party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 (2001). Furthermore, summary judgment may be appropriate in a declaratory judgment action, under the same rules applicable in other actions. *See Meachan v. Board of Education*, 47 N.C. App. 271, 267 S.E.2d 349 (1980). As noted above, in the instant case the parties stipulated to all material facts, leaving only questions of law; accordingly, summary judgment was proper in this case. We need only determine whether summary judgment was properly entered in plaintiffs' favor, or conversely should have been entered in favor of defendant.

The parties stipulated before the trial court that the Floyds' Pontiac and the McNeills' Chevrolet were the only vehicles involved in the collision; neither vehicle struck the disabled GMC truck. Additionally, the parties stipulated that Mary McNeill neither drove nor parked the Chevrolet, nor was she involved in the attempts to link the GMC truck to the Chevrolet.

Plaintiffs contend that Mr. McNeill was "using" both the 1977 GMC truck *and* the 1973 Chevrolet at the time of the accident. Furthermore, plaintiffs contend that G.S. § 20-279.21 requires defendant to provide minimum liability coverage for *each* insured vehicle

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involved in the accident, effectively doubling defendant's liability coverage under the policy, regardless of any contrary language in defendant's policy.

Defendant's argument on appeal is twofold: (1) There is no basis in law for concluding that Jerry McNeill was "using" more than one vehicle at the time of the accident, and (2) even assuming *arguendo* that Mr. McNeill was "using" both the 1977 GMC truck and the 1973 Chevrolet at the time of the accident, the policy's express "Limit of Liability" language places a \$25,000 per person, \$50,000 per accident upper limit on defendant's coverage liability. Based on our case law and the plain language of the Financial Responsibility Act, we must disagree.

The Financial Responsibility Act requires all motor vehicle liability policies issued by insurers in North Carolina to "designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is to be granted[.]" G.S. § 20-279.21(b)(1). Additionally, such policies must:

insure the person named therein . . . using any such motor vehicle *or motor vehicles* . . . against loss from the liability imposed by law for damages arising out of the . . . use of such motor vehicle *or motor vehicles* . . . subject to limits exclusive of interest and costs, *with respect to each such motor vehicle*, as follows: thirty thousand dollars (\$30,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, sixty thousand dollars (\$60,000) because of bodily injury to or death of two or more persons in any one accident[.]

G.S. § 20-279.21(b)(2) (emphasis added).¹ These provisions are written into every motor vehicle liability policy issued in North Carolina as a matter of law, *see, e.g., Wilmoth v. State Farm Mut. Auto Ins. Co.*, 127 N.C. App. 260, 488 S.E.2d 628, *disc. review denied*, 347 N.C. 410, 494 S.E.2d 601 (1997), and the terms of the statute prevail over any conflicting policy provisions. *See, e.g., State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 78 N.C. App. 542, 337 S.E.2d 866 (1985) ("*State Capital I*"), *affirmed*, 318 N.C. 534, 350 S.E.2d 66 (1986) ("*State Capital II*").

1. At the time of the accident at issue herein, G.S. § 20-279.21(b)(2) provided for minimum bodily injury liability limits of \$25,000 per person and \$50,000 per accident; these limits were changed to the current limits of \$30,000 per person and \$60,000 per accident by 1999 N.C. Sess. Laws ch. 228, § 4 (effective 1 July 2000).

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[1] Under its plain language, therefore, at the time of the accident herein the Financial Responsibility Act required all motor vehicle liability policies issued by insurers in North Carolina to provide the insured therein with liability coverage of at least \$25,000 per person and \$50,000 per accident *for each insured vehicle* being “used” by the insured at the time of the accident. Such a requirement must therefore be written into every motor vehicle liability policy issued in this state as a matter of law, *see Wilmoth*, regardless of any conflicting provisions in the insurance policy. *See State Capital I*. G.S. § 20-279.21(b)(2) does not limit an insured’s “use” of insured motor vehicles to one at a time, and we decline to read such a restriction into the statute.² We must therefore determine in the instant case whether, as a matter of law, Mr. McNeill was “using” the insured GMC truck at the time of the accident, such that the accident arose out of the “use” of said truck.³

In *State Capital II*, our Supreme Court affirmed this Court’s decision in *State Capital I*, recognizing that “provisions of insurance policies and compulsory insurance statutes which extend coverage must be construed liberally so as to provide coverage, whenever possible by reasonable construction.” 318 N.C. at 538, 350 S.E.2d at 68. The Court stated that “the test for determining whether an automobile liability policy provides coverage for an accident is not whether the automobile was a proximate cause of the accident. Instead, the test is whether there is a causal connection between the use of the automobile and the accident.” *Id.* at 539-40, 350 S.E.2d at 69.

In *Nationwide Mutual Insurance Company v. Davis*, 118 N.C. App. 494, 455 S.E.2d 892, *disc. review denied*, 341 N.C. 420, 461 S.E.2d 759 (1995), the parties stipulated that:

On 15 August 1990, six-year-old Tiffany Diane Matthews, a pedestrian, was struck by a truck operated by Michael Sain. Immediately before the accident, Tiffany had been a passenger in a van driven by defendant Artie Davis, her grandmother. Ms. Davis had parked the van near the Cat Square Superette and

2. We note that, with respect to uninsured motorist (UM) coverage, G.S. § 20-279.21(b)(3) specifically prohibits “any combination of coverage within a policy . . . to determine the total amount of coverage available” where UM coverage “is provided on more than one vehicle insured on the same policy[.]” However, such a limitation is notably absent from G.S. § 20-279.21(b)(2).

3. The parties do not dispute that the accident arose out of Mr. McNeill’s ownership, maintenance or use of the 1973 Chevrolet, leaving only the question whether the accident also arose out of his simultaneous “use” of the GMC truck.

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turned off the motor. Ms. Davis exited the van and started walking toward the Superette. Tiffany then called to Ms. Davis and asked her if she could come in and get some ice cream. When Ms. Davis told her that she could, Tiffany got out of the passenger side of the van, walked around the van, and walked into the one-lane roadway separating the van and the store. Tiffany was then struck by the truck operated by Mr. Sain.

Davis, 118 N.C. App. at 495-96, 455 S.E.2d at 893. At issue in *Davis* was whether the Davis' van was in "use" at the time of the accident. This Court construed the term "use" liberally, rejecting the insurer's contention that the van was not in "use" at the time of the accident since Ms. Davis was not driving or otherwise operating it at the time of the accident. This Court concluded that the van was in "use" at the time of the accident, as "Ms. Davis was purposefully using the van as a means of transportation to get to her destination, the Cat Square Superette. The van was [therefore] instrumental in the trip to the Superette where the accident happened." *Id.* at 498, 455 S.E.2d at 895. This Court also found a "causal connection" between Ms. Davis' use of the van and the accident, *see State Capital II*, and concluded that the Davis' auto liability policy provided coverage. *See Davis*, 118 N.C. App. at 498, 455 S.E.2d at 895.

[2] Likewise, in the instant case we conclude that Mr. McNeill was using the GMC truck at the time of the accident; furthermore, there is a causal connection between his use of the truck and the accident giving rise to this action. The parties stipulated that Mr. McNeill's intention on the afternoon of 23 November 1996 was to tow the GMC truck home with the Chevrolet using a chain and steel pipe. Additionally, Mr. McNeill attached the two vehicles at some time prior to the accident, but the chain became unhooked from the GMC truck. Mr. McNeill was then attempting to re-attach the vehicles using the chain when the Floyds' car approached and the accident occurred. Under these circumstances and our courts' liberal construction of the term "use," we conclude as a matter of law that Mr. McNeill was using the GMC truck at the time of the accident even though the GMC was not struck nor was it being driven or otherwise operated at the time of the accident. *See Davis*; *see also Whisnant v. Aetna Cas. Ins. Co.*, 264 N.C. 303, 141 S.E.2d 502 (1965) (holding that the plaintiff, who was injured while pushing his disabled vehicle off the road, was using the vehicle at the time of the accident); *Leonard v. N.C. Farm Bureau Mut. Ins. Co.*, 104 N.C. App. 665, 411 S.E.2d 178 (1991) (holding that the plaintiff, who was injured while changing a flat tire, was using the

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vehicle at the time he was injured), *rev'd on other grounds*, 332 N.C. 656, 423 S.E.2d 71 (1992).

Furthermore, we conclude as a matter of law that there was a causal connection between Mr. McNeill's use of the GMC truck and the accident, thereby giving rise to coverage under his motor vehicle liability policy issued by Integon. *See id.* Mr. McNeill's Chevrolet would not have been parked across the southbound lane of traffic and would not have been struck had he not been attempting to attach and tow the disabled GMC truck. Accordingly, the trial court's 13 June 2001 order awarding plaintiffs summary judgment is,

Affirmed.

Judges HUNTER and THOMAS concur.

JOYCE B. BELCHER, PLAINTIFF v. H. ALAN AVERETTE, DEFENDANT

No. COA01-1220

(Filed 20 August 2002)

1. Child Support, Custody, and Visitation— support—attorney fees—action for arrearages after majority

The trial court made sufficient findings to support an award of attorney fees in a child support action where the mother filed the action to collect arrearages after the children had reached majority. Plaintiff is an interested party as defined by N.C.G.S. § 50-13.6 because she provided financial support in the absence of defendant.

2. Discovery— irrelevant and overly broad requests— denied—no abuse of discretion

The trial court did not abuse its discretion in denying defendant's motion to compel discovery when considering a motion for attorney fees in a child support action because some of the request was irrelevant and the trial court could have concluded that a request for tax returns and financial statements for three and five years respectively was overly broad, burdensome, and oppressive, given the scope of the issue before the court.

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3. Costs— attorney fees—child support action—findings

The trial court in a child support action made sufficient findings regarding the reasonableness of attorney fees.

Judge BRYANT dissenting.

Appeal by defendant from judgment entered 6 June 2001 by Judge John L. Whitley in Wilson County District Court. Heard in the Court of Appeals 22 May 2002.

Farris and Farris, P.A., by Robert A. Farris, Jr. and William M.J. Farris, for plaintiff-appellee.

Lederer & Associates, P.A., by Mary-Ann Leon and William M. Lederer, for defendant-appellant.

WALKER, Judge.

Plaintiff and defendant were divorced in 1978. In 1998, plaintiff filed a motion in the cause to enforce defendant's child support obligations, which were embodied in a consent decree. At the time of the filing, the children had reached the age of majority, and plaintiff, on behalf of the children, was attempting to collect arrearages from defendant. Defendant was found to be in contempt of the consent decree, and he subsequently appealed the contempt order. This Court affirmed the contempt order in *Belcher v. Averette*, 136 N.C. App. 803, 526 S.E.2d 663 (2000) (*Belcher I*).

Plaintiff's counsel filed a motion for attorney's fees before the trial court pursuant to N.C. Gen. Stat. § 50-13.6 (2001). Plaintiff's counsel also filed a supplemental motion for the award of plaintiff's attorney's fees to be added to the contempt order pursuant to Rule 60(a) of the North Carolina Rules of Civil Procedure. Defendant filed a motion to compel discovery of information allegedly relevant to plaintiff's ability to pay her attorney's fees.

The trial court found "this Court specifically finds pursuant to N.C.G.S. § 50-13.6 that the Defendant refused to provide support, and that this action, being brought on behalf of the minor children was brought in good faith and the minor children had insufficient means to defray the expenses of the suit[.]" It further found that \$6,000.00 was a reasonable amount for attorney's fees under the circumstances. The trial court granted plaintiff's motion for attorney's fees. It also found "Defendant's Objections and Motions are not in order and are overruled" and denied defendant's motions to compel discovery.

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On appeal, defendant first contends that the trial court erred in awarding attorney's fees pursuant to Rule 60(a) of the North Carolina Rules of Civil Procedure. As the order of the trial court clearly states that the award of attorney's fees was pursuant to N.C. Gen. Stat. § 50-13.6 and it does not address the Rule 60(a) motion, we overrule this assignment of error.

[1] Defendant next contends that the trial court made insufficient findings of fact for the award of attorney's fees under N.C. Gen. Stat. § 50-13.6. The trial court is granted considerable discretion in allowing or disallowing attorney's fees in child support cases. *Brandon v. Brandon*, 10 N.C. App. 457, 463, 179 S.E.2d 177, 181 (1971). Generally, an award will only be stricken if the award constitutes an abuse of discretion. *Clark v. Clark*, 301 N.C. 123, 136, 271 S.E.2d 58, 68 (1980). N.C. Gen. Stat. § 50-13.6 states:

In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

An award of attorney's fees is proper in a contempt proceeding for willful failure to pay child support. *See Reynolds v. Reynolds*, 147 N.C. App. 566, 574-75, 557 S.E.2d 126, 131-32 (2001), *disc. rev. denied*, 355 N.C. 493, 563 S.E.2d 567 (2002). Our Courts have held that, to support a claim for child support, there must be an interested party, acting in good faith, with insufficient means to defray the expenses. *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 723 (1980). A party has insufficient means to defray the expenses of the suit when he or she is "unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit." *Id.* at 474, 263 S.E.2d at 725. If the action is for child support alone, there must be an additional finding that "the party ordered to furnish support has

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refused to provide support which is adequate under the circumstances existing at the time of the institution of the proceeding." *Id.* at 472-73, 263 S.E.2d at 724.

Here, the trial court found that defendant refused to provide support, that the claim was being brought on behalf of the children in good faith, and that the children had insufficient means to defray the cost of litigation. Defendant does not assign error to any of these findings. Defendant's claim is based upon the fact that there was no finding that plaintiff was an interested party with insufficient means to defray the cost of litigation.

Before ruling on the motion, the trial court stated that it acted "after hearing from Counsel for the parties and reviewing the file and evidence in the cause[.]" The order notes the action is brought on behalf of the minor children. Child support by definition is for the benefit of the minor children, *see* N.C. Gen. Stat. § 50-13.4(c), and the children, even upon attaining their majority, ordinarily would not have sufficient funds to sue for past due support. Further, plaintiff is an interested party as defined by N.C. Gen. Stat. § 50-13.6, as she has provided the financial support in the absence of defendant. Thus, no further finding on that issue should be required as it was settled in *Belcher I*.

The trial court had before it *Belcher I* when it determined that plaintiff, on behalf of the children, had been deprived of \$21,900.00 in child support which she had to provide. After a careful review of the record, we find that the trial court made sufficient findings to support its award of attorney's fees.

[2] Defendant next contends that the trial court erred in denying defendant's motion to compel discovery. Whether or not to grant a party's motion to compel discovery is in the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Wagoner v. Elkin City Schools' Bd. of Education*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123, *disc. rev. denied*, 336 N.C. 615, 447 S.E.2d 414 (1994).

Here, defendant requested and plaintiff responded as follows:

1. All written contracts and agreements of attorney fees for counsel to the Plaintiff.

None

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2. All copies of cancelled checks and receipts of monies paid by Plaintiff for attorney fees to counsel for the Plaintiff since the filing of this action.

None

3. Copies of Plaintiff's tax returns for the previous three years prior to this year.

n/a Plaintiff objects, since her ability to pay is not at issue.

4. Copies of any and all financial statements given to any bank, firm, person or corporation for the last five (5) years.

n/a Plaintiff objects, since her ability to pay is not at issue.

5. All copies of cancelled checks drawn on NationsBank or any other bank that Plaintiff has had business with for payment of Health Insurance by the Plaintiff for her children for the last twenty (20) years.

n/a Heath [sic] insurance is not an issue.

6. All copies of records showing health insurance coverage from Blue Cross Blue Shield Health Insurance carried by the Plaintiff for her children for the last twenty (20) years.

n/a Heath [sic] insurance is not an issue.

7. Any document(s) which supports any factual basis for each and every allegation of attorney fees and health insurance coverage on the children contained in Plaintiff's Complaint.

n/a Health insurance is not an issue.

As can be seen, requests 1 and 2 deal with proof that plaintiff had previously paid her attorney. This is irrelevant as there is no requirement that the fee be first paid by plaintiff before seeking an award pursuant to the statute. The final three requests all deal with issues involving health insurance, none of which bears on the issue at hand. Thus, only two requests bear on plaintiff's financial ability and those deal with tax returns and financial statements for the past three and five years respectively.

The trial court could have concluded that such a request was overly broad, burdensome and oppressive, given the narrow scope of the issue before the trial court and the substantial arrearages previously upheld by this Court. Denials of overly broad and burdensome

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requests are routinely upheld. *See, e.g., Williams v. State Farm Mut. Auto. Ins. Co.*, 67 N.C. App. 271, 312 S.E.2d 905 (1984). Thus, the trial court did not abuse its discretion in denying defendant's motions to compel discovery.

[3] Defendant finally contends the trial court failed to make proper findings regarding the reasonableness of the attorney's fees. To award attorney's fees, the trial court must consider the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney. *United Laboratories, Inc. v. Kuykendall*, 102 N.C. App. 484, 494, 403 S.E.2d 104, 111 (1991), *aff'd*, 335 N.C. 183, 437 S.E.2d 374 (1993).

Here, after reviewing the record and hearing evidence and arguments of counsel, the trial court found the following in part:

[T]he sum of \$6,000.00, pursuant to the Affidavit by Plaintiff's Counsel as to fees and costs incurred, is reasonable under the circumstances of this case, considering the subsequent Appeal by Defendant resulting in the affirmation of the original Order secured by Plaintiff's Counsel on behalf [of] the minor children, as well as the original Hearing hereon, the usual and customary rates and charges, hourly rate, time spent and efforts expended by Counsel for Plaintiff as reflected in his Affidavit[.]

After a careful review of the record and the order, we find that the trial court made sufficient findings regarding the reasonableness of the attorney's fees and its consideration of the relevant factors.

In conclusion, we find the trial court did not err in granting plaintiff's motion for attorney's fees. Further, the trial court did not err in denying defendant's motion to compel discovery.

Affirmed.

Judge McCULLOUGH concurs.

Judge BRYANT dissents.

Judge BRYANT, dissenting:

I respectfully dissent from those portions of the majority opinion which affirm the award of attorney's fees and the trial court's denial of discovery.

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N.C.G.S. § 50-13.6 clearly states that “the court may in its discretion order payment of reasonable attorney’s fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit.” It must be determined whether plaintiff, as the interested party in this matter, had insufficient means to defray the expense of suit, *not* the minor children. See *Taylor v. Taylor*, 343 N.C. 50, 468 S.E.2d 33 (1996) (stating that defendant was an interested party acting in good faith and evidence existed that she could defray the costs of litigation); *Reynolds v. Reynolds*, 147 N.C. App. 566, 557 S.E.2d 126 (2001) (stating that plaintiff, as an interested party, acted in good faith and did not have the means to defray the costs of suit); *Thomas v. Thomas*, 134 N.C. App. 591, 518 S.E.2d 513 (1999) (noting that the trial court failed to make findings as to whether mother, as the interested party, acted in good faith and could defray expenses of litigation); *Osborne v. Osborne*, 129 N.C. App. 34, 497 S.E.2d 113 (1998) (stating that defendant in the proceedings was an interested party acting in good faith, who could not defray the expenses of suit without impoverishing herself); *Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E.2d 176 (1992) (stating that mother was an interested party acting in good faith).

The majority states that plaintiff provided financial support for the children in the absence of defendant. The majority states that plaintiff was deprived of \$21,900.00 in child support. In addition, the majority states that children, even upon attaining the age of majority, would not have sufficient means to bring suit for past due child support. Based on the above stated facts, the majority concluded that “the trial court made sufficient findings to support its award of attorney’s fees.” I disagree.

It may be correct, as the majority alludes, that in a case involving child support or custody issues, a parent is *technically* acting on behalf of or in the interests of her minor children. However, I find it inconceivable that our legislators intended the courts to consider the minor children’s ability to bear the expense of suit (instead of focusing on the parent’s ability to bear the expense of suit when the parent is the party seeking enforcement of the underlying child support order). See, e.g., *Van Every v. McGuire*, 348 N.C. 58, 62, 497 S.E.2d 689, 691 (1998) (stating that when determining a party’s entitlement to an award of attorney’s fees in child custody dispute, “if [the] trial court finds from the evidence that [the party] has sufficient means to defray the expense of the suit, then [the party’s] request for attorney’s fees shall be denied”); *Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33,

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35 (1996) (“[B]efore attorney’s fees can be taxed in an action for custody or in [an] action for custody and support, . . . the party seeking the award” of attorney’s fees must both allege and prove that party is an interested party acting in good faith and that party has insufficient means to defray the expense of suit). It is uncontroverted that defendant was found to be in contempt of a child support order, with arrears totaling \$21,900.00. Moreover, it is undisputed that plaintiff provided care and support for the children in the absence of support from defendant. However, these facts do not lend themselves to the direct conclusion that plaintiff, as the interested party bringing this action in good faith, was of insufficient means to defray the expense of suit. The statutorily required findings of N.C.G.S. § 50-13.6 cannot be circumvented in the manner in which the majority reasons.

The trial court failed to make findings regarding plaintiff’s ability to defray the expense of suit. I would therefore reverse the trial court’s decision as to this issue and remand for findings as to plaintiff’s ability to defray the expense of suit.

In addition, I would reverse the trial court’s denial of defendant’s motion to compel discovery of information relevant to plaintiff’s financial ability to pay her attorney’s fees.

In North Carolina, a party may obtain discovery of any unprivileged information, as long as that information is relevant to the pending action and is reasonably calculated to lead to the discovery of admissible evidence. N.C.R. Civ. P. 26(b)(1). Whether or not to grant a party’s motion to compel discovery resides in the sound discretion of the trial court, and will not be disturbed absent abuse of that discretion. *See Wagoner v. Elkin City Schools’ Bd. of Education*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123 (1994).

As noted above, I believe that the trial court committed error in failing to make findings concerning plaintiff’s financial ability to pay her attorney’s fees. The information defendant sought to discover was both relevant to and reasonably calculated to reveal evidence admissible as to the issue of plaintiff’s financial ability to pay her attorney’s fees. Defendant having satisfied the requirements enunciated in N.C.R. Civ. P. 26(b)(1), I believe that the trial court committed error amounting to an abuse of discretion in failing to grant defendant’s motion to compel discovery of information relevant to plaintiff’s ability to pay her attorney’s fees.

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[152 N.C. App. 460 (2002)]

For the reasons set forth herein, I would reverse and remand to the trial court to make findings in accordance with N.C.G.S. § 50-13.6. Specifically, the trial court should be ordered to make findings regarding whether plaintiff has insufficient means to defray the expense of the suit. In addition, I would reverse the trial court's denial of defendant's motion to compel discovery.

ERIC DYLAN BYRD, PLAINTIFF V. JAMES MELVIN ADAMS, DEFENDANT

No. COA01-1162

(Filed 20 August 2002)

Damages and Remedies— punitive damages—impaired driving—issue of fact

The trial court erred by granting defendant's motion for partial summary judgment on plaintiff's claim for punitive damages arising from an automobile accident where plaintiff based his punitive damages claim on allegations of impaired driving and there was evidence that defendant fell asleep after consuming two beers and 3 prescription drugs, but an Alco-Sensor test indicated that defendant's blood-alcohol level was not above the legal limit. Neither the Alco-Sensor test nor the trooper's observations of defendant are determinative as to whether defendant was impaired in this case.

Appeal by plaintiff from an order entered 11 July 2001 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 23 May 2002.

Pulley, Watson, King & Lischer, P.A., by Guy W. Crabtree, for plaintiff-appellant.

Haywood, Denny, & Miller, L.L.P., by Robert E. Levin, for defendant-appellee.

CAMPBELL, Judge.

Plaintiff appeals an order dismissing his punitive damages claim against defendant that arose out of a vehicular accident between the parties. For the reasons stated herein, we reverse.

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On the evening of 19 April 1997, plaintiff was driving westbound on Interstate 40 in Durham County. Defendant, a medical student, was driving directly behind plaintiff. As both parties proceeded along Interstate 40 at a speed of sixty-five to seventy miles per hour, defendant collided with the rear of plaintiff's vehicle on two occasions. As a result of the second collision, plaintiff lost control of his vehicle and spun around in the median. Defendant's vehicle crossed over the median and the opposite lanes of travel, ultimately coming to a stop in a tree.

Immediately after the accident, defendant became afraid and left the scene. He subsequently called the police from a nearby house. Officers from the Durham City Police Department picked up defendant from the house and returned him to the scene of the accident. Defendant was questioned by Trooper Edmund Watkins ("Trooper Watkins") approximately twenty-five minutes after the accident had taken place. Defendant told Trooper Watkins that he was sleepy prior to colliding with plaintiff's vehicle, but he was uncertain as to whether he had fallen asleep at the wheel or blacked out. Defendant did not realize what had happened until after his vehicle had struck the tree.

As defendant spoke, Trooper Watkins smelled alcohol on his breath and subsequently gave defendant a roadside Alco-Sensor test. Although defendant admitted to having drunk one or two beers prior to the accident, the test results established that his blood alcohol level was below the legal alcohol limit. No other sobriety tests were given because Trooper Watkins determined that his observations of defendant did not otherwise indicate that defendant was intoxicated or impaired. Thus, no charges were brought against defendant for intoxication or impairment, but he was charged with reckless driving and leaving the scene of an accident. Defendant ultimately pled guilty to careless and reckless driving as the result of a plea bargain.

Thereafter, plaintiff filed a complaint dated 4 February 2000 alleging that the accident was the result of defendant's negligence and seeking punitive damages. Plaintiff amended his complaint on 15 May 2001 to add allegations to both his claims, alleging that defendant had been driving while under the influence of an impairing substance at the time of the accident. On 25 April 2001, defendant filed a motion for summary judgment on plaintiff's impairment allegations and plaintiff's claim for punitive damages. On 11 July 2001, the Durham County Superior Court granted defendant's motion for partial summary judgment.

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ment and dismissed plaintiff's claim for punitive damages.¹ Plaintiff appeals.

Plaintiff assigns error to the trial court's order granting defendant's motion for partial summary judgment of plaintiff's claim for punitive damages. For the following reasons, we reverse the court's decision.

"To prevail on a claim for punitive damages, plaintiff must show that defendant's *established* negligence which proximately caused his injury reached a higher level than ordinary negligence; that it amounted to wantonness, willfulness, or evidenced a reckless indifference to the consequences of the act." *Moose v. Nissan of Statesville*, 115 N.C. App. 423, 428, 444 S.E.2d 694, 697 (1994) (citations omitted). In actions involving motor vehicle accidents, this "higher level than ordinary negligence" (hereinafter "gross negligence") can be established "where at least one of three rather dynamic factors is present: (1) defendant is intoxicated . . . ; (2) defendant is driving at excessive speeds . . . ; or (3) defendant is engaged in a racing competition[.]" *Yancey v. Lea*, 354 N.C. 48, 53-54, 550 S.E.2d 155, 158 (2001) (citations omitted). Here, plaintiff's complaint included claims for negligence and punitive damages, both of which alleged that defendant was impaired and under the influence of an intoxicating substance when he collided with plaintiff's vehicle. Plaintiff included these allegations to establish the willful and wanton element needed to support his punitive damages claim arising out of the parties' vehicular accident. Based on our review of the record and trial transcript, we conclude the court erred in ultimately granting defendant's motion for partial summary judgment on this claim.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). The burden of establishing the lack of a triable issue of fact resides with the movant. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 62-63, 414 S.E.2d 339, 342 (1992). A movant-defendant may meet this burden by proving "either the non-existence of an essential element of the plaintiff's claim or that the plaintiff has no evidence of an essential

1. Even though the order only mentions plaintiff's claim for punitive damages, we presume that the trial court also granted partial summary judgment on plaintiff's impairment allegations based on the case law provided in this opinion.

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element of her claim.” *Nourse v. Food Lion, Inc.*, 127 N.C. App. 235, 239, 488 S.E.2d 608, 611 (1997). Once the movant-defendant meets this burden, then the plaintiff must “produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial.” *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). In order to meet his burden, the plaintiff “may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” § 1A-1, Rule 56(e). In determining whether summary judgment is appropriate, “[a]ll inferences of fact must be drawn against the movant and in favor of the nonmovant.” *Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342.

In the case *sub judice*, when all inferences of fact are drawn in favor of plaintiff, defendant is unable to meet his burden of proving that plaintiff had no evidence establishing impairment to support the willful and wanton element of his punitive damages claim. Evidence was offered that defendant “fell asleep” while driving his vehicle, but did not wake up until after (1) having collided with the rear of plaintiff’s vehicle, (2) having then crossed over the interstate median and the opposite lanes of travel, and (3) eventually having come to a stop in a tree. Also, defendant conceded that he had consumed two beers and taken three prescription drugs prior to the accident. Our statutes define an impairing substance as alcohol or “any other drug or psychoactive substance capable of impairing a person’s physical or mental faculties” § 20-4.01 (14a). Defendant offered no evidence that these prescription drugs (1) were not impairing substances and (2) to refute the implication that mixing alcohol and these drugs would not have impaired his ability to drive.

Finally, evidence was offered regarding the Alco-Sensor test defendant was given by Trooper Watkins, which indicated defendant’s blood-alcohol level was not above the legal limit. In his deposition, Trooper Watkins testified that this test is not a legal screening device; it is used only “to detect if there’s any alcohol concentration on a person’s breath.” Furthermore, the results of Alco-Sensor test, as well as Trooper Watkins’ contemporaneous observations of defendant, took place approximately twenty-five minutes after the accident. Therefore, this test and Trooper Watkins’ observations are not completely determinative as to whether defendant was impaired, especially in light of defendant not having undergone an actual legal test to determine his blood-alcohol level (such as an Intoxilyzer test) nor

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any other field sobriety tests. In the absence of such evidence, the remaining evidence presented to the court could have allowed a jury to possibly recognize and estimate defendant's alleged impairment because he had consumed alcohol and prescription drugs that may have caused him to "lose the normal control of his bodily or mental facilities to such an extent that there is an appreciable impairment of either or both of these faculties." *State v. Harrington*, 78 N.C. App. 39, 45, 336 S.E.2d 852, 855 (1985) (quoting *State v. Carroll*, 226 N.C. 237, 241, 37 S.E.2d 688, 691 (1946)). Taking this evidence with all inferences of fact drawn in plaintiff's favor, there is a genuine issue regarding plaintiff's punitive damages claim which must be resolved by a jury along with the issue of defendant's alleged impairment.

Accordingly, the trial court erred in granting defendant's motion for partial summary judgment on the plaintiff's claim for punitive damages.

Reversed.

Judges MARTIN and TIMMONS-GOODSON concur.

ALLEN WAYNE SEYMOUR, JR., PLAINTIFF-APPELLEE v. LENOIR COUNTY, SANDY BOTTOM VOLUNTEER FIRE DEPARTMENT, INC., AND JAMES GOFF, JR., INDIVIDUALLY AND AS AN AGENT OF SANDY BOTTOM VOLUNTEER FIRE DEPARTMENT, INC., DEFENDANT-APPELLANTS

No. COA01-972

(Filed 20 August 2002)

1. Immunity— sovereign—insurance purchased—intentional acts excluded—no waiver

Defendant volunteer fire department did not waive its sovereign immunity through the purchase of insurance where plaintiff-fireman was injured when he was ordered into a burning building during a training exercise and brought a *Woodson* claim which alleged intentional acts substantially certain to cause injury or death which were not covered by defendant's insurance.

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2. Workers' Compensation— exclusivity—volunteer fire department instructor—co-employee

A volunteer fireman's claim against an instructor was not barred by the exclusivity provision of the Workers' Compensation Act where plaintiff brought a *Pleasant* claim by alleging that the instructor was willful and wanton in ordering him into a burning building during a training exercise, but the instructor contended that he was an officer in the corporation and that the stricter *Woodson* standard applied. The instructor was more plaintiff's co-employee than employer.

3. Immunity— public official—position not created by statute or constitution

An instructor of volunteer firemen was not a public official entitled to personal immunity where his position was not statutorily or constitutionally created.

Appeal by defendants from an order entered 12 April 2001 by Judge Benjamin G. Alford in Superior Court, Lenoir County. Heard in the Court of Appeals 24 April 2002.

Davis & McCabe, P.A., by John M. McCabe; and Timothy D. Welborn, P.A., by Timothy D. Welborn, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Edward C. LeCarpentier III, for defendant-appellants.

McGEE, Judge.

Allen Wayne Seymour, Jr. (plaintiff) filed suit on 11 May 2000 against Lenoir County, Sandy Bottom Volunteer Fire Department, Inc. (defendant Fire Department), and James Goff, Jr. (defendant Goff). Plaintiff's claims arose from events which occurred on 19 May 1997, when plaintiff was employed as a volunteer firefighter with defendant Fire Department. Defendant Fire Department conducted a training exercise in which it set a house on fire. Selected members of defendant Fire Department, including plaintiff, were instructed to enter the house and conduct a search and rescue operation. When plaintiff entered the house, he was engulfed by flames and suffered severe burns and pulmonary injuries. Defendant Goff was the instructor in charge of the exercise on behalf of defendant Fire Department.

Defendant Goff and defendant Fire Department filed a motion to dismiss for lack of subject matter jurisdiction pursuant to N.C. Gen.

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Stat. § 1A-1, Rule 12(b)(1) on 8 February 2001. Defendant Lenoir County did not join in this motion. Defendant Fire Department and defendant Goff argued that the exclusivity provision of the Workers' Compensation Act and the doctrine of sovereign immunity precluded plaintiff's claims. The motion was heard on 19 February 2001 and denied by the trial court in an order entered 12 April 2001. Defendant Fire Department and defendant Goff appeal from this order.

I.

[1] Defendant Fire Department first argues the trial court erred in denying its motion to dismiss because defendant Fire Department is immune from liability under the doctrine of sovereign immunity. Defendant Fire Department contends sovereign immunity precludes plaintiff's claims because defendant Fire Department has not waived its immunity by purchasing liability insurance that provides coverage for intentional misconduct which defendant knew was substantially certain to cause serious injury or death.

Accidents which occur in the course and scope of employment are generally subject to the exclusivity provision of the North Carolina Workers' Compensation Act. *See* N.C. Gen. Stat. § 97-9 and N.C. Gen. Stat. § 97-10.1 (1999). However, our Courts have created two notable exceptions to this general rule. A plaintiff may bring either a *Pleasant* claim or a *Woodson* claim for intentional acts by the employer or by a co-employee which result in injury. *See Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985); and *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). We note that plaintiff's claim against defendant Fire Department is a *Woodson* claim. Under a *Woodson* claim, a plaintiff can bring a civil suit against an employer based on intentional acts where "an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct[.]" *Woodson*, 329 N.C. at 340, 407 S.E.2d at 228.

In general, "[w]hile provisions extending coverage will be construed broadly to find coverage, provisions excluding coverage are not favored and will be strictly construed against the insurer and in favor of the insured, again, to find coverage." *Nationwide Mut. Fire Ins. Co. v. Grady*, 130 N.C. App. 292, 295, 502 S.E.2d 648, 651 (1998). Defendant Fire Department admits its insurance policies cover injuries which arise out of accidents; however, defendant Fire Department contends that plaintiff alleges injuries which occurred as a result of an *intentional act* which defendant Fire Department knew

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"would be substantially certain to cause Plaintiff serious injury or death." Defendant Fire Department points to an exclusionary provision in two of defendant Fire Department's insurance policies which bars claims based on intended actions. The first policy has an exclusion which provides:

2. Exclusions

This insurance does not apply to:

a. Expected or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured.

A second insurance policy owned by defendant Fire Department states the policy will cover "bodily injury or property damage which . . . is caused by an occurrence." The policy defines occurrence as "an accident . . . which results in bodily injury or property damage which is neither expected nor intended from the standpoint of the insured." Both policies contain essentially the same exclusion.

Plaintiff contends that in order for an "act to be excluded under the 'expected and intended' exclusion [of an insurance policy], both the act and the resultant harm must have been intended." *Nationwide*, 130 N.C. App. at 295-96, 502 S.E.2d at 651. Plaintiff further contends that while defendant Goff's "act" of ordering plaintiff into the burning house was intended, there is no evidence which shows defendant Goff or anyone connected with defendant Fire Department intentionally injured plaintiff. Our Supreme Court has held that "in order to avoid coverage on the basis of the exclusion for expected or intended injuries in the insurance policy . . . the insurer must prove that the injury itself was expected or intended by the insured. Merely showing the act was intentional will not suffice." *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 706, 412 S.E.2d 318, 324 (1992). However, our Supreme Court continued that

where the term "accident" is not specifically defined in an insurance policy, that term *does* include injury resulting from an intentional act, if the injury is not intentional or *substantially certain to be the result of the intentional act*.

N.C. Farm Bureau Mut. Ins. Co. v. Stox, 330 N.C. 697, 709, 412 S.E.2d 318, 325 (1992) (second emphasis added). Thus, although it is possible for injury from an intentional act to be within the definition of an accident, that is not the situation where the injury is "substantially

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certain to be the result of the intentional act.” *Id.* Because plaintiff alleged that defendant Fire Department engaged in intentional acts which were “substantially certain to cause Plaintiff serious injury or death,” these acts do not meet the definition of an “accident.” Thus, we conclude plaintiff did not allege injuries by accident or as a result of an occurrence and the insurance policies at issue do not provide coverage for plaintiff’s claim. Consequently, defendant Fire Department has not waived its sovereign immunity. We reverse the trial court’s denial of defendant Fire Department’s motion to dismiss for lack of subject matter jurisdiction.

II.

[2] Defendant Goff argues the trial court erred in denying his motion to dismiss because plaintiff’s claims against him are barred by the exclusivity provision of the North Carolina Workers’ Compensation Act. As discussed above, our Courts have created two exceptions to the exclusivity provision of the Workers’ Compensation Act. A *Pleasant* claim may be brought against co-employees and will cover intentional acts which are willful or wantonly negligent. A *Woodson* claim may be brought against employers but carries a stricter standard of intentional acts which the employer knew or should have known would cause serious injury or death. Plaintiff has elected to bring a *Pleasant* claim against defendant Goff. Plaintiff alleges defendant Goff’s actions were willful and wanton. The “Workers’ Compensation Act does not shield a co-employee from common law liability for willful, wanton and reckless negligence.” *Pleasant*, 312 N.C. at 716, 325 S.E.2d at 249. However, defendant Goff contends he is an officer of a corporation and not a “co-employee” of plaintiff, and therefore subject to the stricter standard articulated in *Woodson*. Since plaintiff has alleged only willful and wanton behavior, defendant Goff contends plaintiff’s claim is barred by the exclusivity provision of the Workers’ Compensation Act. We disagree.

In *Woodson*, our Supreme Court held that when corporate employers could not be held liable, neither could their corporate officers and directors because “in the workers’ compensation context, corporate officers and directors are treated the same as their corporate employer vis-a-vis application of the exclusivity principle.” *Woodson*, 329 N.C. at 347, 407 S.E.2d at 232. As a result, in order for a corporate officer to be held liable, the officer must have engaged in intentional misconduct which the officer knew was substantially certain to cause serious injury or death. Defendant Goff contends plaintiff has only asserted that defendant Goff was willfully and wantonly

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negligent; therefore, plaintiff has not met the *Woodson* standard. However, we fail to see how defendant Goff holds a position in the Sandy Bottom Volunteer Fire Department, Inc. which would equate to a corporate officer position of shareholder, president, vice-president, or secretary. Similar to the defendant in *Pleasant*, defendant Goff is more of a co-employee of plaintiff than an employer of plaintiff. We hold defendant Goff should be held to the same standard as a co-employee. As a result, under *Pleasant*, plaintiff can bring a civil action against defendant Goff as a co-employee by alleging willful and wantonly negligent behavior while also maintaining an action under the Workers' Compensation Act.

[3] Defendant Goff also seeks to escape liability by claiming to be a public official and, under *Jones v. Kearns*, 120 N.C. App. 301, 462 S.E.2d 245 (1995), immune from personal liability for mere negligence in the performance of his duties. However, in order to be considered a public official, the position must have been statutorily or constitutionally created. See *Block v. County of Person*, 141 N.C. App. 273, 540 S.E.2d 415 (2000). Defendant Goff has pointed this Court to no statute or constitutional provision creating the position he filled. We overrule this assignment of error, and we affirm the trial court's denial of defendant Goff's motion to dismiss.

Affirmed in part and reversed in part.

Judges WALKER and CAMPBELL concur.

STATE OF NORTH CAROLINA v. WILLIAM RANDELL

No. COA01-1151

(Filed 20 August 2002)

Contempt— refusal to stand in court—summary hearing required

A contempt order was reversed where a defendant who refused to stand when a recess was called was not given the statutorily required summary hearing before being found in contempt. Giving defendant the opportunity to explain himself after the fact is not sufficient. It was noted that defendant's actions

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[152 N.C. App. 469 (2002)]

were contemptuous and that judges must be allowed to maintain order, respect and proper function in their courtrooms.

Appeal by defendant from orders entered 30 March 2001 and 2 April 2001 by Judge William Z. Wood, Jr., in Yadkin County Superior Court. Heard in the Court of Appeals 15 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General Jill F. Cramer, for the State.

William Randell, pro se.

PER CURIAM.

The Honorable William Z. Wood, Jr., was conducting court during the 30 March 2001 Criminal Session of Yadkin County Superior Court. At 11:09 a.m., the court called for a morning recess, and the bailiff called for all to rise. A person in the courtroom, later identified as defendant William Randell, did not obey the call to rise. Defendant continued to remain seated even after Judge Wood called for all to rise. The transcript reflects the subsequent exchange between defendant and Judge Wood:

THE COURT: Come on up, sir.

MR. RANDELL: For what?

THE COURT: You're in custody. Thirty days.

MR. RANDELL: For what?

THE COURT: Contempt of court.

MR. RANDELL: I was getting my books.

THE COURT: You didn't stand up. What's your name?

MR. RANDELL: As a matter of fact . . .

THE COURT: . . . what is your name . . .

MR. RANDELL: . . . The law doesn't require me to stand . . .

THE COURT: . . . what's your name?

MR. RANDELL: (No response).

THE COURT: What's your name?

MR. RANDELL: My name is William Randell.

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[152 N.C. App. 469 (2002)]

THE COURT: Okay, Mr. Randell, I'll be glad you hear later on [sic]. He's in custody, sheriff.

Defendant was brought back into the courtroom by Judge Wood later on the same day. At this point, Judge Wood gave defendant an opportunity to be heard on the contempt of court charge. Defendant claimed that he did not believe that he was in contempt because there was no law that required him to stand. Judge Wood clarified that defendant was going to be punished for not giving his name when the court asked for it in addition to not standing when summoned to do so. To this, defendant responded that he believed that he was not obligated to do so because there was no apparent reason. Judge Wood again had defendant removed from the courtroom and into custody. At this point, it was 3:38 p.m. on Friday afternoon, 30 March 2001. Judge Wood signed an order the same day, finding defendant in contempt of court. It contained the following facts: the bailiff asked for all to rise; then the judge asked for all to rise, and a man in the back still did not stand; the man did not stand after further motions from the bailiff to do so; when that man was called to the front, the judge asked him his name, to which he replied, "Why do you need to know my name?"; he further stated that the law did not require him to stand up.

On Monday, 3 April 2001, defendant was brought back into the courtroom before Judge Wood. Defendant was again told that he "refused to stand up, and then you didn't tell me your name when I asked you." Defendant argued federal case law and that the court was adjourned, thus he could not have interrupted business. At this point, while the trial court continued to find defendant in contempt of court, the court released him for time served. Defendant appeals.

I.

The law on summary criminal contempt is found in N.C. Gen. Stat. § 5A-14 (2001). Recently, this Court visited this area in *State v. Terry*, 149 N.C. App. 434, 562 S.E.2d 537 (2002):

Pursuant to N.C. Gen. Stat. § 5A-14(a):

The presiding judicial official may summarily impose measures in response to direct criminal contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt.

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N.C. Gen. Stat. § 5A-14(a) (1999). However,

Before imposing measures under this section, the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt. The facts must be established beyond a reasonable doubt.

N.C. Gen. Stat. § 5A-14(b) (1999). The Official Commentary to the statute notes that it:

was intended not to provide for a hearing, or anything approaching that, in summary contempt proceedings, but merely to assure that the alleged contemnor *had an opportunity to point out instances of gross mistake about who committed the contemptuous act or matters of that sort.*

N.C. Gen. Stat. § 5A-14 (Official Commentary 1999) (emphasis added).

Terry, 149 N.C. App. at 439, 562 S.E.2d at 540-41. *Terry*, relying on the case of *In re Owens*, 128 N.C. App. 577, 496 S.E.2d 592 (1998), *aff'd*, 350 N.C. 656, 517 S.E.2d 605 (1999), stated further that this Court noted that the “‘requirements of [§ 5A-14] are meant to ensure that the individual has an opportunity to present reasons not to impose a sanction.’” *Terry*, 149 N.C. App. at 440, 562 S.E.2d at 541 (quoting *Owens*, 128 N.C. App. at 581, 496 S.E.2d at 594).

We hold that the trial court failed to comply with the statutory requirements by failing to give defendant a “summary opportunity to respond” to the charge of criminal contempt. *See Peaches v. Payne*, 139 N.C. App. 580, 533 S.E.2d 851 (2000). The record shows that defendant was not accorded the summary hearing before being found guilty of contempt. Although the trial court did give defendant ample opportunity to explain himself after the fact, such does not serve to correct the previous error. We therefore reverse the contempt order.

Though we reverse the present contempt order, we note that defendant’s actions were indeed contemptuous. Defendant asserted at the trial court level as well as on appeal that one is not required to rise when asked to do so by the trial court, and such conduct is not a proper basis for contempt. We emphatically disagree.

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[152 N.C. App. 469 (2002)]

Criminal contempt

“is a term applied where the judgment is in punishment of a[] [completed] act . . . tending to interfere with the administration of justice[.]” Accordingly, “[c]riminal [contempt] proceedings are those brought to preserve the power and to vindicate the dignity of the court and to punish for disobedience of its processes or orders.”

State v. Reaves, 142 N.C. App. 629, 632-33, 544 S.E.2d 253, 256 (2001) (citations omitted). North Carolina has not dealt with the question of whether a refusal to rise while court is adjourning and leaving the courtroom is sufficient grounds for contempt. While federal courts have taken differing positions, *see, e.g., In re Chase*, 468 F.2d 128 (7th Cir. 1972) (yes); *United States v. Snider*, 502 F.2d 645 (4th Cir. 1974) (no), federal contempt powers are more limited than those of the state, being limited to preventing actual obstruction of justice. 18 U.S.C. § 401(1) (2000); *see also Snider*, 502 F.2d at 665 (“[s]ince [this court’s ruling] is not based upon federal constitutional grounds, it need have no effect upon the various States in the Circuit.”).

Courtroom decorum and function depends upon the respect shown by its officers and those in attendance. Unexcused refusals to stand create a rift in that respect and interrupt the normal proceedings of court. Those who refuse to stand, for whatever reason, must yield “to the imperative need of the community in having an established forum in which controversies between man and man and citizen and sovereign may be decided in a calm, detached, neutral atmosphere.” *Id.* (Widener, J., dissenting). Our trial court judges must be allowed to maintain order, respect and proper function in their courtrooms. Failure to stand when one is capable of doing so is indeed a contemptuous act in North Carolina.

Reversed.

Panel consisting of:

Judges WALKER, McCULLOUGH and BRYANT.

CAPITAL OUTDOOR, INC. v. GUILFORD CTY. BD. OF ADJUST.

[152 N.C. App. 474 (2002)]

CAPITAL OUTDOOR, INC., PETITIONER/APPELLANT/CROSS-APPELLEE V. GUILFORD
COUNTY BOARD OF ADJUSTMENT, RESPONDENT/APPELLEE/CROSS-APPELLANT

No. COA00-969-2

(Filed 20 August 2002)

**1. Administrative Law— judicial review of agency decision—
scope of review—standard of review**

An appellate court's obligation to review a superior court order upholding or reversing agency/board decisions for errors of law can be accomplished by addressing the dispositive issues before the agency/board and the superior court without: (1) examining the scope of review utilized by the superior court; and (2) remanding the case if the standard of review employed by the superior court cannot be ascertained.

**2. Zoning— billboard—agricultural district not residentially
zoned property**

A county development ordinance prohibiting the placement of a billboard within 300 feet of any "residentially zoned property" was not violated by a billboard located within 300 feet of land zoned "Agricultural" because property zoned "Agricultural" is not "residentially zoned property" within the meaning of the ordinance even though residences are permitted in an "Agricultural" district.

On remand based on order of Supreme Court entered 7 March 2002 in *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust.*, 355 N.C. 269, 559 S.E.2d 547 (2002), reversing decision of the Court of Appeals as to the standard of review and remanding for consideration on the merits of remaining assignments of error. Appeal by petitioner and respondent from order entered 27 April 2000, by the Honorable Marcus L. Johnson, in Guilford County Superior Court. Originally heard in the Court of Appeals 14 August 2001.

Waller, Stroud, Stewart & Araneda, LLP, by Betty S. Waller, Cary, for petitioner.

Guilford County Attorney's Office, by Jonathan V. Maxwell, County Attorney, and Mercedes O. Chut, Deputy County Attorney, for respondent.

CAPITAL OUTDOOR, INC. v. GUILFORD CTY. BD. OF ADJUST.

[152 N.C. App. 474 (2002)]

BRYANT, Judge.

Based on the reasons stated in the dissenting opinion in *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust.*, 146 N.C. App. 388, 552 S.E.2d 265 (2001) (hereinafter *Capital I*), *rev'd per curiam*, 355 N.C. 269, 559 S.E.2d 547 (2002), the Supreme Court reversed the majority opinion of this Court as to the majority's articulation of the standard of review of superior court orders upholding or reversing agency/board decisions. The evidence presented before the superior court in this case is summarized in *Capital I*. Consistent with the Supreme Court's mandate, we now articulate the standard of review to be employed by an appellate court.

[1] As stated by the dissent in *Capital I*, "an appellate court's obligation to review a superior court order for errors of law, . . . can be accomplished by addressing the dispositive issue(s) before the agency/[board] and the superior court *without* [(1)] examining the scope of review utilized by the superior court" and (2) remanding the case if the standard of review employed by the superior court cannot be ascertained. *Id.* at 392, 552 S.E.2d at 268 (Greene, J., dissenting) (emphasis added) (citation omitted). Thus, depending on which issues were raised in the present case, an appellate court must determine whether: "1) the [b]oard committed any errors in law; 2) the [b]oard followed lawful procedure; 3) the petitioner was afforded appropriate due process; 4) the [b]oard's decision was supported by competent evidence in the whole record; and 5) . . . the [b]oard's decision was arbitrary and capricious." *Id.* at 390, 552 S.E.2d at 267.

[2] According to the dissent in *Capital I*:

The dispositive issue in this case is whether the Board erred in interpreting the Guilford County Development Ordinance (the Ordinance). See *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 140 N.C. App. 99, 102-03, 535 S.E.2d 415, 417 (2000) (proper construction of ordinance presents a question of law and is reviewable *de novo*).

Ordinance § 6-4.24 prevents the placement of a billboard within "three hundred (300) feet [of] any residentially zoned property." Guilford County, N.C., Guilford County Development Ordinance § 6-4.24 (Nov. 19, 1990). In early 1999, Capital Outdoor, Inc. (Capital) applied for and received a permit from the Guilford County Planning Department (the Department) to place a billboard in Guilford County. After the billboard was constructed,

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the Department revoked the permit because the billboard was located within 300 feet of land zoned "Agricultural."

The underlying issue is whether property zoned "Agricultural" is "residentially zoned property" within the meaning of section 6-4.24. The Board argues that because residences are permitted within "Agricultural" zoned areas, property zoned "Agricultural" is "residentially zoned property." We disagree. Although residences are permitted in an "Agricultural" district, such a district "is primarily intended to accommodate uses of an agricultural nature," Ordinance § 4-2.1(A), and in any event, is not *zoned* "Residential." There are two districts which are *zoned* "Residential": Ordinance § 4-2.1(B) covers a Single-Family Residential district, and Ordinance § 4-2.1(C) covers a Multi-Family Residential district. Because the language of Ordinance § 6-4.24 is plain and unambiguous, "it must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction." *Utilities Comm'n v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1976). In the Ordinance, there is no provision prohibiting the location of a billboard within 300 feet of property zoned "Agricultural." The prohibition is only against the location of billboards within 300 feet of property zoned as either Single-Family Residential or Multi-Family Residential. Accordingly, the Board committed an error of law in construing the Ordinance otherwise and erred in revoking Capital's permit. Likewise, the superior court erred in affirming that revocation.

Id. at 393, 552 S.E.2d at 268-69 (Greene, J., dissenting). In agreement with this analysis, we reverse the order of the superior court and remand to that court for remand to the Board for reinstatement of the billboard permit.¹

REVERSED and REMANDED.

Judges GREENE and CAMPBELL concur.

1. In light of our ruling, we need not address petitioner's alternative arguments and respondent's cross-appeal.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 20 AUGUST 2002

AYERS v. PATZ No. 01-1243	Guilford (00CVS7144)	Affirmed
BIVINS v. KOCH INDUS., INC. No. 01-790	Ind. Comm. (I.C. 178062)	Affirmed
CLENDENING v. SEARS, ROEBUCK & CO. No. 01-1235	Gaston (98CVS5102)	Affirmed
DODDER v. YATES CONSTR. CO. No. 01-815	Forsyth 94CVS6219	No error
GOSNELL v. ROBERTSON No. 01-1316	Buncombe (00CVS3187)	No error
IN RE ALLEN No. 01-1266	Buncombe (99J235)	Affirmed
IN RE REAGAN No. 01-1303	Caswell (00J33)	Affirmed
IN RE SIMATO No. 01-1484	Cumberland (00J266) (00J267)	Affirmed
IN RE TORRENCE No. 01-1291	Guilford (99J8)	Affirmed
IT'S PRIME ONLY, INC. v. DARDEN No. 01-1246	Dare (95CVS323) (95CVS324) (95CVS437) (97CVS368)	Affirmed in part, reversed and remanded in part
McKYER v. McKYER No. 01-1065	Mecklenburg (00CVD9237)	Affirmed
MOORE v. DATA SYS. NETWORK CORP. No. 00-1515	Mecklenburg (98CVS12286)	Affirmed
NEWLANDS v. NEWLANDS No. 01-222	Mecklenburg (00CVD13889JVH)	Affirmed
QUICK v. QUICK No. 01-548	Richmond (98CVD642)	Affirmed
SMITH v. CAROLINA MANOR TREATMENT CTR. No. 01-1090	Robeson (99CVS1749)	New trial

STATE FARM MUT. AUTO. INS. CO. v. FOLEY No. 01-763	New Hanover (99CVS3728)	Affirmed
STATE v. BARRETT No. 01-914	Moore (99CRS3685)	No error
STATE v. BROWN No. 01-1159	New Hanover (00CRS12407)	No error
STATE v. CHAMBERS No. 01-771	Pasquotank (00CRS328) (00CRS329)	No error
STATE v. COUSINS No. 01-796	Cabbarrus (99CRS20064) (99CRS20065) (99CRS20067) (99CRS20068) (00CRS16536)	No error
STATE v. THOMAS No. 01-863	Rockingham (00CRS2233) (00CRS3891)	No error
TEMPLETON v. TEMPLETON No. 01-908	Durham (97CVD1679)	Affirmed in part and remanded in part
WHITE v. HUETT No. 00-1328	Perquimans (97CVS186)	Affirmed

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[152 N.C. App. 479 (2002)]

STATE OF NORTH CAROLINA v. GEORGE MARECEK, DEFENDANT

No. COA01-542

(Filed 3 September 2002)

1. Constitutional Law— due process—right to prepare defense—motion for continuance

The trial court in a second-degree murder case did not violate defendant's due process rights to present favorable evidence, to prepare a defense, and to introduce potentially exculpatory evidence, nor did it violate his right to effective assistance of counsel, by denying defendant's motions for a continuance, because: (1) in regard to defendant's expert on homicidal drowning reenactment who had not completed his study and report and who would not be available to testify at trial, defendant's affidavit did not lead to a belief reasonably grounded on known facts that material evidence would be obtained if the continuance was granted; and (2) in regard to the potentially exculpatory witness who allegedly confessed to this crime, defendant did not provide a confession to the court, an affidavit in support of his motion, or any form of detailed proof indicating how he obtained the information.

2. Evidence— hearsay—state of mind exception

The trial court did not err in a second-degree murder case by failing to exclude certain testimony of three witnesses, concerning statements made by the victim about her suspicions that her husband was having an affair, on the grounds of alleged inadmissible hearsay statements, because: (1) the statements testified to by two of the witnesses are admissible under the state of mind exception of N.C.G.S. § 8C-1, Rule 803 since the statements include both fact and emotion; and (2) the other witness's testimony was not hearsay since the witness was testifying about her own statements that she made to the victim.

3. Criminal Law— jury instruction—implied admissions

The trial court did not err in a second-degree murder case by giving an instruction on implied admissions based on a witness's testimony that he stated to defendant that the witness knew defendant killed his wife, because defendant's reported failure to deny that he killed his wife, along with his incriminating statements, manifest circumstantially

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his assent to the truth of the witness's statement that defendant killed his wife.

4. Evidence— credibility—failure to allow testimony—no prejudicial error

Although the trial court erred in a second-degree murder case by preventing defendant from offering opinion testimony from two witnesses as to defendant's reputation for truthfulness to bolster defendant's credibility, the error does not warrant a new trial because defendant has failed to carry his burden to show that, absent this error, a different result would have been reached at trial.

5. Evidence— defendant owned club or nightstick—relevancy

The trial court did not abuse its discretion in a second-degree murder case by overruling defendant's objections to evidence that he owned a club or nightstick, because: (1) the witnesses' testimony that defendant, as recently as a month before the murder, kept a nightstick in his car is relevant to the State's theory that defendant inflicted the blunt-force injuries of his wife, and then caused her to drown; and (2) the evidence regarding defendant's possession of a nightstick supported the State's theory that defendant injured his wife with a blunt object and then caused her to drown.

6. Sentencing— statutory mitigating factor—lacked criminal convictions

The trial court did not err in a second-degree murder case by failing to find the statutory mitigating factor under N.C.G.S. § 15A-1340.4(a)(2)(a) that defendant lacked any criminal convictions, because defendant did not present any direct evidence regarding his criminal record.

7. Sentencing— aggravating factor—took advantage of position of trust or confidence

The trial court erred in a second-degree murder case by sentencing defendant in excess of the presumptive range based on the finding of the aggravating factor under N.C.G.S. § 15A-1340.4(a)(1)(n) that defendant took advantage of a position of trust or confidence, because there was no evidence showing that defendant exploited his wife's trust in order to kill her.

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Appeal by defendant from judgment entered 19 July 2000 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 15 April 2002.

Attorney General Roy Cooper, by Assistant Attorney General Steven F. Bryant, for the State.

Rudolf Maher Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

HUDSON, Judge.

Defendant appeals his conviction and sentence for second-degree murder. For the reasons given below, we find no prejudicial error in the guilt-innocence phase of the trial, but we remand for resentencing.

In 1991, defendant George Marecek, retired after serving thirty-six years in the Special Forces at Fort Bragg, lived with his wife, Viparet Seawong Marecek (variously referred to as “Viparet” or “Viparat”), in Fayetteville. During their vacation at Fort Fisher in May and June of 1991, Viparet was beaten with an unidentified blunt object and drowned. Defendant was indicted for the first-degree murder of his wife on 10 January 1994.

Defendant was first tried in 1995, but the jury deadlocked, and the court declared a mistrial. *See State v. Marecek*, 130 N.C. App. 303, 304, 502 S.E.2d 634, 634 (hereinafter, *Marecek I*), *disc. review denied*, 349 N.C. 532, 526 S.E.2d 473 (1998). A second jury trial began on 27 January 1997, and concluded with defendant’s conviction of second-degree murder. *See id.*, 502 S.E.2d at 635. Defendant appealed to this Court, which reversed and remanded for a new trial. *See id.* at 308, 502 S.E.2d at 637.

A third jury trial was held beginning on 10 July 2000. At this trial, the State presented evidence tending to show that defendant bought a life insurance policy on his wife in January of 1991, in the amount of \$150,000, with an accidental death rider paying an additional \$150,000. Richard and Susan McCall, who stayed with the Mareceks for two or three weeks during the spring of 1991, testified that there was much tension between defendant and Viparet, in contrast to the way their relationship had been earlier in their marriage.

The State presented evidence from which one could infer that defendant was involved with a woman in the Czech Republic. State’s Exhibit 30 consisted of an excerpt from a letter written by defendant

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in the Czech language to an unknown person and signed by “Jirka,” which is a diminutive form of the Czech name that translates to “George.” Hana Kucerova, who translated the letter from Czech into English, read her translation to the jury. She read, in pertinent part, the following:

“The ultimate thing for me now is to arrange for us to be together.” Square bracket, translator’s note: punctuation mark is missing, square bracket. “The plan is ready. I only need time and your help with it, for you to be good, to learn English and to take care of yourself. Everything else I will do myself.

. . . .

“Darling, have that new translation done immediately and send a copy. How was that trip to Decin [a city in the Czech Republic]? Is the car all right? Now you can sit down and answer my questions. I keep thinking of you all the time and I wish I were together with you over there, but it will be soon. Trust me. I have to rush. I am sending you a kiss and I love you terribly.

“See you soon. Yours faithful to you, Jirka.”

Susan Kirk, defendant’s daughter, testified that defendant made three trips to Czechoslovakia during the summer and fall of 1990. Viparet began to call Kirk with increasing frequency while defendant was in Czechoslovakia. After defendant’s trips to Czechoslovakia, while defendant and Viparet were visiting Kirk, defendant showed slides he took while in Czechoslovakia. There were several of defendant and Hana Marecek, in which defendant and Hana were standing next to each other and/or touching. Viparet elbowed Kirk each time defendant showed a picture of himself next to Hana. Kirk told Viparet not to be concerned that defendant might be having an affair with Hana Marecek because Hana was defendant’s cousin.

Viparet had discovered some letters that she thought indicated her husband was having an affair with a woman in Czechoslovakia. She sought to have the letters translated by a woman who taught Czechoslovakian at the Special Forces school in Fort Bragg. The teacher’s husband, Russell Preston (a friend of defendant), called defendant and told him on the telephone, in Czech, that Viparet wanted the letters translated because she wanted to use them in a divorce proceeding. Defendant asked Preston to get the letters for him, but Preston was unable to do so. Preston called Viparet and asked her for the letters, but Viparet said “No, no, don’t call me here.”

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Inge Shaw, a friend of Viparet's who lived in the Mareceks' neighborhood, told Preston "to be very careful, that you don't want to get her in any trouble, she's very scared about this." Preston told defendant that he was unable to get the letters and that Shaw told him to be careful, and defendant replied, "I'll take care of it. . . . F-ing bitch, I'm getting tired of her crap."

Richard McCall testified that while he was staying with the Mareceks in the spring of 1991, he and Viparet discussed the Mareceks' upcoming trip to Fort Fisher, and Viparet indicated that she did not want to go. The day before defendant and Viparet left for Fort Fisher, Viparet told her friend, Inge Shaw, that she was afraid she might not return. Shaw's additional statements are discussed in our analysis of the hearsay issues raised by defendant.

Defendant and Viparet arrived at Fort Fisher on Friday, 31 May 1991. Around 6:00 p.m., on either Friday or Saturday, defendant, accompanied by Viparet, approached Anthony Rackley and asked if he knew of a secluded fishing spot. Rackley directed him to Davis Beach, which could be reached by taking Fort Fisher Boulevard to Davis Road. Rackley told defendant that at the end of Davis Road, "the pavement ends and you get out of your car and you've got an open little beach way there with trails." On Sunday morning, 2 June 1991, vacationer Carola Treu was on the pier fishing when defendant approached her and introduced himself and Viparet. He referred to Viparet as "his little girl." Defendant told Treu that they were on vacation and looking for a better fishing spot. Viparet stood silent with her head down.

At about 4:00 p.m. on Monday, 3 June 1991, Dennis Rood, an electrician at Fort Fisher, passed two pedestrians as he drove east on Fort Fisher Boulevard at about five miles per hour. He identified the two people as defendant and Viparet, and stated that they were walking west, towards the river. He described Viparet as wearing a reddish-colored blouse with shorts, and stated that one of them was carrying beach equipment. At about the same time on the same day, Tom and Beth Deleuw were driving past the Fort Fisher recreation area when they saw a white man and an "Oriental woman" crossing the road, carrying beach items, and looking like they were either coming from or going to the beach. Mr. Deleuw remembered that he said to Beth, "Look, there's a retired air force colonel and his pie-faced wife."

James Davis, a deputy with the New Hanover County Sheriff's Department, took a missing person's report from defendant at about

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8:00 p.m. on that evening, 3 June 1991. Defendant told Deputy Davis that when he left for the beach at about 12:35 that afternoon, his wife was at the cottage. She planned to do laundry at the cottage and then check on a fishing spot for the next day. Defendant said that when he returned to the cottage, she was not there, and he began to worry after 5:00 when she had not returned. By the time Deputy Davis left the cottage, it was getting dark. He instructed defendant to leave the lights on and to leave a note on the front door if he left, so that Deputy Davis could find him in case he found defendant's wife. Deputy Davis then conducted a search, including the Davis Beach area, but found nothing. Deputy Davis passed defendant's cottage ten or twelve times during the course of the evening, and he noticed that the porch light was off and defendant's vehicle never moved. He checked for a note each time, but did not see one.

Carola Treu testified that she saw defendant at about 7:00 p.m. that evening. She and her mother were on the pier and he showed them his wife's driver's license and asked if they had seen her. Defendant told them that his wife left at 3:00 to find a fishing place and he stayed home to do laundry. She was supposed to be home at 5:00 and was now two hours late. Defendant told Treu and her mother that Viparet left the cottage without her handbag, money, or jewelry.

Treu and her mother saw defendant again on Tuesday, 4 June 1991, around noon. Treu testified that defendant "looked good," so she asked him if his wife had turned up. She testified that "then he turned, his face turned, and he said, 'Oh, no, she still didn't turn up, and I was running around, looking for her all the time, and now I have to go home and change clothes to get long pants because mosquitos bite me up all over the place, and then I start again looking for her.' "

On Tuesday, 4 June 1991, Detective George Landy of the New Hanover County Sheriff's Department, accompanied by Major Lanier and Detective Bill Simmons, went to defendant's cottage to gather information about Viparet. Defendant was in the process of completing a handwritten summary of events. Detective Landy read defendant's statement into the record, as follows:

THE WITNESS: To whom it may concern: I, Colonel George Marecek—in parentheses NMI, meaning no middle initial—and my wife, Viparat Marecek, arrived here at Fort Fisher on Friday, 31 May 1991, for a one-week vacation that we have planned since February, 1991. Our daily schedule generally followed this routine: 6:00, four-mile morning run, light breakfast, 8:30 hours a.m.

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beach until 1430 p.m., showers, washing of beach towels and other items, preparing evening meal, and a short walk after dinner, one hour, watch evening news, local and international, select a short program of mutual interest and then retire for the night.

On 3 June, 1991, the day started just like all others, with the following differences: Viparat and I returned from the beach at 12:35 p.m., Viparat prepared a fresh salad and a small portion of low fat cottage cheese and we watched the noon news and a soap opera—in parentheses it says the word “Loving”—and a portion of—again in parentheses, “All My Children.” I suggested to Viparat that we return to the beach for a couple, three hours, but she told me to go by myself, that she has plenty of sun for now and she will wash all the towels and other items and, if she finish early, she may go and look for a good place to go fishing tomorrow.

Also, she mentioned she would stop at the pier, and if she is up to go swimming, she will go to the base pool. She told me to be home by 1700 hours and if she is not here to remove the chicken from the refrigerator, remove the skin and prepare them for dinner and that she would be home shortly after. We exchanged greetings and I left for the beach approximately 2:30 p.m. and returned back at 4:55 p.m. Viparat was not at home, but she washed all towels and other items and neatly folded them up and stored them in the cabinets.

I showered and washed the towel I used when I noticed that there is a heavy rain outside. I looked at the watch; it was 5:20 p.m. I was concerned at this time, for the first time, about her absence and also considered to go with the car and look for her so she would not get wet. However, I decided to wait and give her some more time. Shortly, the rain stopped, and when she failed to return, I left the house and started to look for her. I looked everywhere, on base, off base, on the beach, with the reception center, talked to neighbors, other families staying in Fort Fisher. No luck, no one seen her. I went to the local police station, but nobody was there. I continued to look for her and, at 8:10 p.m., I called 911 from the reception center and requested assistance from the sheriff's department.

While I was waiting for his arrival, Officer McDonald from the local police station arrived, obtained the necessary information on my wife Viparat and departed to see if he could locate her. He

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informed me that a sheriff will arrive shortly and will assist me. Shortly after McDonald departed, approximately 15 minutes, Sheriff Davis arrived and obtained all the necessary information on my wife and myself, completed a police form which I signed, and requested a picture of Viparat for identification. I gave him her North Carolina driver's license, since that is the only picture I have of Viparat here. He departed, informing me that he or the police officer will keep me informed.

I continued to look for Viparat until 11:35 p.m., at which time I decided to organize a search plan for the following day, June 4th, 1991, the way I think Viparat would go looking for a new fishing place. I started early morning, checking the area left of the Fort Fisher pier. No luck in finding anything. Was hoping to get a national guard helicopter, but no luck.

As soon as I finished that area, I noticed a sand bar area in a greater distance and decided that, after checking the immediate area around the snack bar, I would find a way there. Walking through the picnic area, I realized that the big dirt road may lead into the general area. I left for home, changed my clothing into something more protecting against the elements and started out with a search of the area right of the Fort Fisher pier.

Prior of actually starting, I got my bearings from the Fort Fisher pier, when I noticed a person actually standing on the sand bar. This gave me more psychological motivation to drive on, thinking Viparat may have seen the same a day earlier. I followed the road until I reached a blacktop road on which I turned left and followed it until the river. A good area, much used for fishing and camping. When I entered the sand area, I noticed the person again on the sand bar at a greater distance, wearing a hat—or excuse me, wearing what looked like a dark blue jacket, with a beard, and it looked like he was fishing, but I am not sure. The important thing for me was that if he can stand there, I can follow the edge and check the area. I zigzagged back and forth on the river edge, losing site [sic] of the person.

After a short time, I spotted something different, something that did not blend with the nature, it was my Viparat. The rest is very difficult to articulate in words. My subconscious mind must have taken control, and many things happened at once. I had no control over myself. I felt anger, outrage, hate. I took the shortest way back to Fort Fisher to call the authorities. I cannot com-

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plete—I cannot completely account for what happened during my run back or what actually happened when I arrived there.

Q And is there anything else? You mentioned a notation or a map on that document, is that correct?

A Yes, there is some writing back here, some names that he was giving us to contact, and plus an outline of the drawing of the river along Fort Fisher and the dirt trail from the actual air base over to Davis Road and down to the river.

Dennis Rood testified that on 4 June 1991, he entered the general store at Fort Fisher and saw defendant on the floor “hollering, ‘I found her, I found her.’” Rood helped him up and asked where she was; defendant indicated down the dirt road toward Davis Beach. Rood and another man went down that road in a golf cart and walked through the wooded area but did not find anything.

Henry Beeker, the public works director for the town of Kure Beach, testified that around lunchtime on 4 June 1991, he and the Kure Beach Police Chief, Troy Hamilton, responded to a radio call that there had been a possible drowning at Fort Fisher. They arrived at the general store to find defendant on his hands and knees on the floor, “in pretty bad shape.” They helped defendant into the police car and told him to direct them to the body. Following defendant’s directions, Chief Hamilton drove the police car to the end of Davis Beach Road. Defendant appeared disoriented and was unable, at first, to tell the men where his wife’s body was. Then defendant indicated the direction, and the men found her. She was in the marsh grass, in the water, face down and naked.

Detective Larry Hines of the New Hanover County Sheriff’s Department arrived at the Davis Beach area a few minutes after 1:00 p.m. on 4 June 1991. He testified that it took three or four people to turn the body over. After the body was turned over, Detective Hines noticed injury to the lip and eye areas and some marking or bruising in the neck area. After the medical examiner left with the body, Detective Hines searched the area and found several paths, including one that came out close to where the body was found. He saw “quite a few” shoeprints in the area, but due to the sandy nature of the area, was not able to identify the prints, except to say that they were “tennis shoe type.”

Later that afternoon, Detective Hines and Detective Simmons spoke with defendant. Detective Hines testified as follows:

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Q And what did [defendant] tell you at that time?

A He was mainly speaking to Detective Simmons, but I was in the conversation and heard. He explained that him and his wife had had lunch that day; that after lunch, approximately, I think 2:30, they had watched part of a soap opera. I think he described it as *All My Children*. He made the determination he was going back to the beach. She was going to stay behind and do some laundry, and she may go look for a place they may could go fishing. They agreed to meet back at the cottage around 5:00. He says when he got back from the beach, she wasn't there, he got worried and started looking for her, and he actually contacted the sheriff's department and filed a report.

Q Okay.

A And then he said he continued looking that night. He said the next day, he got up in the morning, went jogging. He said that was a ritual for him and Viparat, they both would go jogging. He got up that morning by his self and went jogging. After that, he came back and proceeded to look and search the base area for Viparat. At one point, he made it to the boat ramp, to the pier. He said he got out on the pier and tried to put his mind into the mind of Viparat and where would she go looking for a place to fish. He said he observed a white male with a beard, wearing a blue suit, standing in the area north of that pier, and it appeared to him this guy was fishing. So he figured that if that guy could get there and fish, then maybe Viparat thought she could get there and fish.

So he proceeded to that area and, when he got there, the man was not there, but that he observed his wife's body floating in the water; that she was face down; that he approached the body, attempted to turn her over and couldn't, or turn her neck, but then he turned the body over, saw bubbles coming out of her mouth; that he reached down and kissed here, and then he said he lost it and just went running back to the base.

Roger Hayes testified that on 4 June 1991, he and his uncle went to the beach at the end of Davis Beach Road so that he could fish while his uncle lay out in the sun. They arrived at the beach in mid-morning and stayed all afternoon, until the police arrived. Hayes testified that while he and his uncle were on the beach, Hayes saw only one other person: a man on the opposite side of the beach, who had

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dark facial hair and was wearing something like a jumpsuit and blue boots. Hayes saw the man walk down to the water, turn and look at Hayes, and then walk back into the woods. This man, who was not identified, never stepped or reached into the water. About fifteen or twenty minutes later, officers came to the beach and asked Hayes if he had seen a woman. Hayes testified that he did not see defendant or anyone else walk down Davis Beach toward where the body was found.

Dr. Robert Thompson performed the autopsy on the body. He testified that the body had begun to deteriorate slightly, and “[t]here were tissue defects in the earlobes above the left eye and the left side of the lower lip. These were consistent as having been made by marine animals after having been in the water for a period of time.” He testified that there were blunt-force injuries to the head, which would not have been fatal but which may have caused the victim to lose consciousness. There were also several defensive wounds on the victim’s arms and hands. The cause of death was drowning, to which the head injuries would have contributed. Dr. Thompson found no evidence of sexual assault and was unable to determine the time of death.

Several witnesses testified that defendant had owned what was described as a billy club, blackjack, or nightstick, that he kept in his car.

On 7 June 1991, Detective Landry went to defendant’s home in Fayetteville for the purpose of recovering some letters hidden in the victim’s sewing machine. Defendant had given permission to search his residence, and Detective Landry retrieved letters and documents written in a foreign language.

On Thursday, 6 June 1991, Susan Kirk, defendant’s daughter, drove to Fort Fisher to be with her father, after she learned Viparet was dead. The next morning, she accompanied defendant to the funeral home to pick up the box of Viparet’s cremated remains. Kirk testified that defendant patted the box of remains and said, “Now I have control of my little girl.” While they were driving from the funeral home to the police station, defendant told Kirk about the life insurance policy he had on Viparet, that he would collect \$300,000 due to the accidental death clause, and that he intended to spend it on various family members. Defendant did not want to have a memorial service for Viparet, but Kirk insisted.

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The State introduced into evidence a marriage certificate containing the names George Marecek and Hana Marecekova dated 12 July 1992. Kirk testified that Hana Marecekova is defendant's cousin.

Defendant presented evidence tending to show that he and Viparet had a good relationship. Rose Flynn, a neighbor who met defendant in the spring of 1991 in her capacity as a real estate broker, testified that she attended a meeting at which the Mareceks were present. The meeting turned into "a little social thing," where everyone made small talk, which "was very pleasant, friendly." Her husband, Phillip Flynn, testified that several times when he saw Viparet working in the yard, he stopped and talked with her for a few minutes. There was one occasion in the spring of 1991 when he spent some time with the Mareceks, and he noticed nothing unusual.

Gunther Monteadora testified that he knew defendant through a social club that met regularly on Saturday mornings. Occasionally Viparet would attend. Monteadora testified that he never heard the Mareceks speak harshly or angrily towards each other and that he knew of no problems or difficulties between them.

Christopher Cinkoske also attended the social club meetings. When he saw the Mareceks together, they appeared "[c]aring, affectionate glances, occasional touch, chit-chat, things like that, just normal married stuff." On one occasion in March of 1991, Cinkoske went to the Marecek's home to invite defendant to a party. Defendant was not home, so Cinkoske waited and chatted with Viparet. Cinkoske testified that Viparet seemed excited and happy about the plans she and defendant had to add on to the house. Cinkoske talked with Viparet at the party and again on Memorial Day of 1991, when she mentioned that she and defendant were going to go to Europe to bring back "a distant female relation to [defendant], a cousin or something. She was joking around with me, since I was single and not seeing anybody at the time, she was joking around, I might want to meet this single female cousin they were bringing back."

Robert Holman, a neighbor of the Mareceks, testified that he had been invited to the Mareceks' house on two or three occasions. He testified that he was not aware of anything out of the ordinary between defendant and Viparet, nor did he notice any hostility or tension between the two. He testified that he talked to Viparet daily, because she worked in the yard a lot, and he would see her when he came home from work.

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Alphonso Woodall testified that he had known defendant since 1981, when defendant was Woodall's superior. Woodall and the Mareceks lived in the same neighborhood, and Woodall would see both from time to time. Defense counsel tried to elicit Woodall's opinion as to defendant's reputation in the community for truthfulness and honesty, but the court sustained the State's objection.

Joseph Lupiak testified that he had served with defendant in the Special Forces since the 1950's. Over the years, Lupiak and his wife saw the Mareceks at many social events, and Lupiak often socialized with defendant. Lupiak testified that he was able to observe the Mareceks' relationship, as late as the early part of 1991, and that it was "a very amicable relationship. I seen no hostilities, no problems. They seemed to get along fine. In fact, they seemed to care for each other very much."

Lupiak also described defendant's distinguished military career and his many accomplishments and honors, and testified that defendant was honorably discharged. When the court ruled that evidence of defendant's reputation for truthfulness and honesty could not be presented, defense counsel asked for and was allowed the opportunity to make a proffer of Lupiak's testimony. In response to a question about whether, in his opinion, defendant was law-abiding, Lupiak testified that defendant was "one of those individuals that will do nothing—from what I've seen, that will do nothing that would be—that would hurt his integrity, that would—that would make him look bad. He is one of those exceptional individuals, very law-abiding."

The defense presented several witnesses whose testimony was consistent with defendant's written summary of events on the day of Viparet's death. Counsel for the defense was allowed to read into the record the testimony of two witnesses who were unavailable to testify but had testified at an earlier trial. Thai Truong was visiting Fort Fisher with his foster family on the weekend of the murder. He went to the beach on Sunday, 2 June 1991, and saw defendant and Viparet there. He noticed Viparet because she was "pretty good-looking." Truong testified that he saw defendant and Viparet on the beach in the morning and then again in the afternoon. On Monday morning, 3 June 1991, Truong again saw both defendant and Viparet on the beach. Truong left the beach around noon to have lunch, and when he returned at about 1:30, he saw only defendant on the beach. He remembered that Viparet did not return to the beach in the afternoon, because he joked with his foster mother, Susan Abe, that Oriental women are supposed to make lunch. Truong testified that he stayed

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on the beach that afternoon until 5:30 or 6:00 and did not see defendant leave.

Susan Abe, Truong's foster mother, also testified that she saw defendant and Viparet on the beach on Sunday, 2 June 1991. She explained that her attention was drawn to Viparet because she, herself, was of mixed ancestry and liked to guess the backgrounds of other "Oriental[s]." On Monday morning, Abe saw both defendant and Viparet on the beach. Abe testified that only defendant was on the beach on Monday afternoon. She recalled joking about the "proper Oriental wife . . . cleaning up after lunch." Abe also recalled that her husband was jealous because defendant watched her when she went into the water, since his wife was not there. Abe testified that her family left the beach on Monday at around 5:00. She did not see or recall defendant leaving the beach, but acknowledged that "[h]e may have."

David L. Kelly, Jr., who was in the North Carolina National Guard, testified that he was at Fort Fisher for a two-week training period at the time of the murder. Kelly saw defendant and his wife running each morning as he was leaving for his physical training. He also saw Viparet on several afternoons around 3:30 or 4:00, walking towards the river. Kelly testified that on Monday, 3 June 1991, he saw Viparet walking by herself between 3:15 and 3:45. He remembered the time because he had to return to his room to get some things before a 4:00 class.

Richard Ward Tobin also attended the two-week National Guard Training at Fort Fisher. He saw defendant and his wife jogging on the mornings of Saturday, 1 June 1991, and Sunday, 2 June 1991. Tobin testified that on Monday, 3 June 1991, around 4:00 in the afternoon, he saw Viparet alone, leaving the reception center as he was entering. Tobin smoked a pipe on the pier. At approximately 4:25, he saw Viparet again, still alone, in front of the reception area. He was sure of the time because he knew how long his pipe would stay lit.

Brooks Adcox, a banker, testified that in 1991 defendant had \$130,000 to \$150,000 in liquid assets. These assets consisted of joint bank accounts, to which Viparet had access. After Viparet's death, defendant instructed Adcox to release all his records to the police.

On 19 July 2000, the jury returned a verdict of guilty of second-degree murder. The trial court found as an aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense, and the court found as mitigating factors that defend-

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ant was honorably discharged from the military, he had been a person of good character or had a good reputation in his community, and he had an outstanding military career. The court found that the aggravating factor outweighed the mitigating factors and sentenced defendant to thirty years imprisonment. Defendant appeals.

I.

[1] On 19 June 2000, defendant moved for a continuance of the trial, which was scheduled to begin on 10 July 2000. He contended, *inter alia*, that his expert on homicidal drowning re-enactment, Walter Hendrick, had not completed his study and report and would not be available to testify at trial. Defendant's motion was accompanied by an affidavit from Hendrick.

After a hearing on the motion, the trial court found that

in reference to the date of this matter, that as early as March of this year this Court advised the lawyers for both parties that the trial of this matter was to be set in June of this year. That subsequently, the Court advised the parties that the Court would set the date on July the 10th of this year. The Court finds that counsel and parties for both parties have known about the date and that in reference to the acquiring of any experts to testify in this matter, it was incumbent upon counsel to make sure that the experts were available at the date that the matter was set for trial. I find that in reference to the defendant's proposed expert, Mr. Hendrick, that it appears that this witness was contacted well after the trial of the case had been set. The Court also finds that the witness has not been subpoenaed for trial.

Finding "no justifiable reason" for a continuance, the court denied the motion.

Although a motion for a continuance "is ordinarily addressed to the sound discretion of the trial judge, and the ruling will not be disturbed absent a showing of abuse of discretion," when the motion "raises a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable on appeal by examination of the particular circumstances revealed in the record." *State v. Beck*, 346 N.C. 750, 756, 487 S.E.2d 751, 755 (1997); *see State v. Tunstall*, 334 N.C. 320, 328, 432 S.E.2d 331, 336 (1993) ("This Court has long held that when a motion for a continuance is based on a constitutional right, the issue presented is an issue of law and the trial court's conclusions of law are fully reviewable on appeal.").

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Defendant argues here that in denying his motion to continue, the trial court violated his constitutional rights. Specifically, he contends that the court denied his due process rights to present favorable evidence, to prepare a defense, and to introduce potentially exculpatory evidence, as well as his right to effective assistance of counsel.

In *Tunstall*, our Supreme Court held that:

The defendant's rights to the assistance of counsel and to confront witnesses are guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and by sections 19 and 23 of Article I of the Constitution of North Carolina. Implicit in these constitutional provisions is the requirement that an accused have a reasonable time to investigate, prepare and present his defense.

Tunstall, 334 N.C. at 328, 432 S.E.2d at 336 (internal quotation marks and citation omitted); see *State v. Walls*, 342 N.C. 1, 25, 463 S.E.2d 738, 748 (1995), cert. denied sub nom. *Walls v. North Carolina*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996). Thus, a defendant "must be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony." *Tunstall*, 334 N.C. at 328, 432 S.E.2d at 336 (internal quotation marks omitted); see *Walls*, 342 N.C. at 25, 463 S.E.2d at 748. " 'However, no set length of time is guaranteed and whether defendant is denied due process must be determined under the circumstances of each case.' " *Walls*, 342 N.C. at 25, 463 S.E.2d at 748 (quoting *State v. McFadden*, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977)).

Because defendant here has alleged that the denial of his motion to continue deprived him of his constitutional rights, we review the ruling *de novo*. See *Beck*, 346 N.C. at 756, 487 S.E.2d at 755. "If defendant demonstrates that the denial of a motion for continuance was erroneous and that the error was a constitutional violation, defendant is entitled to a new trial unless the State shows that the error was harmless beyond a reasonable doubt." *Id.*

Our Supreme Court has stated that:

Continuances should not be granted unless the reasons for the delay are fully established. "[A] motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance." *State v. Kuplen*, 316 N.C. 387, 403, 343 S.E.2d 793, 802 (1986). " '[A] postponement is proper if

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there is a belief that *material* evidence will come to light and such belief is reasonably grounded on known facts.’” *State v. Tolley*, 290 N.C. 349, 357, 226 S.E.2d 353, 362 (1976) (quoting *State v. Gibson*, 229 N.C. 497, 502, 50 S.E.2d 520, 524 (1948)) (alteration in original).

Id., 487 S.E.2d at 755-56 (citation omitted) (alteration in original). However, “a mere intangible hope that something helpful to a litigant may possibly turn up affords no sufficient basis for delaying a trial to a later term.” *State v. Tolley*, 290 N.C. 349, 357, 226 S.E.2d 353, 362 (1976) (internal quotation marks omitted).

The issue here is whether defendant’s motion gave rise to a belief, “reasonably grounded on known facts,” that “*material* evidence [would] come to light” if the continuance was granted. Hendrick’s affidavit provides, in relevant part, as follows:

4. On June 7-8, 2000, a drowning re-enactment was performed by the RIPTIDE homicidal drowning investigation team which was lead [sic] by me.

5. This investigative re-enactment included a study of the Cape Fear River’s physical attributes and a review of the Cape Fear River tide conditions at Fort Fisher, North Carolina in order to recreate the conditions as closely as possible to the conditions of the scene of Viparat Marecek’s death on June 3, 1991.

6. On approximately June 7, 2000, RIPTIDE placed mannequins in the Cape Fear River to study the movement over time of a body in the water at and near the location where the body of Viparat Marecek was found on June 4, 1991.

7. The drowning re-enactment demonstrated that a body could not have remained in the water for a period of twenty continuous hours at the location where the body of Viparat Marecek was found.

8. The RIPTIDE team also discovered small crustaceans that moved about just at the water’s edge where the water met the shore. This is the most likely type of place where the victim was left for at least a period of time greater than a couple of hours. Further investigation of these crustaceans and the type of bite marks they would leave are warranted to prove or disprove this possibility. Knowing where the victim was left for at least a period of time will help provide the necessary information to

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determine where Viparat Marecek was left in the water in relationship to where her body was found.

9. Because of my other commitments, I have not yet been able to prepare a report on my findings.

10. Once a report has been prepared, significant additional investigation and study can then be performed by additional experts.

We conclude that defendant failed to meet his burden. The affidavit indicated that Hendrick's study showed the victim's body did not remain at the location where it was found for twenty hours. Hendrick suggests that additional investigation might determine where the victim's body was "left in the water in relationship to where her body was found." While such information could be helpful to the defense, it would not necessarily have been so. Moreover, Hendrick concludes that "significant additional investigation and study" by "additional experts" is necessary. The defense did not identify these additional experts or indicate whether they were available; nor did the defense indicate the nature of the additional investigation and study that was necessary. Thus, the affidavit does not lead to a belief "reasonably grounded on known facts" that material evidence would be obtained if the continuance were granted. *Beck*, 346 N.C. at 756, 487 S.E.2d at 756 (internal quotation marks omitted).

We conclude that the affidavit suggests "a mere intangible hope that something helpful to [defendant] may possibly turn up," *Tolley*, 290 N.C. at 357, 226 S.E.2d at 362 (internal quotation marks omitted), rather than "a belief that *material* evidence will come to light," *Beck*, 346 N.C. at 756, 487 S.E.2d at 756 (internal quotation marks omitted), as is required. Accordingly, the trial court did not err in denying defendant's motion to continue on this basis.

At the conclusion of defendant's evidence, defense counsel again asked for a continuance, this time on the ground that a potentially exculpatory witness was unavailable to testify. Defense counsel addressed the court as follows:

There's another potential witness we are attempting to get. He's a detective from Detroit, who I learned about on Friday as a possible witness, to come and, Your Honor, I've been trying to—I wrote a letter and faxed it to the people in Detroit on Friday, and I've been trying to contact them yesterday and today to see if he can and if he's available to come. He's a detective who is dealing

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with obtaining confessions from a serial killer named Eric Armstrong in Detroit. I have reason to believe, but I have not seen the confession, there is a statement in that indicating that perhaps Viparat Marecek may have been his first victim, and I want to bring him here so he can testify about this confession, and I ask for a continuance until tomorrow so I can get this witness here. The reason for not having done this before are two reasons; I didn't know and have information of—and, in fact, I tried to gather further information, including the copy of this confession. I didn't know about this until Friday, and I've been making diligent efforts to get further information from the court and to get him here, but I have not yet been able to do so, and it would be imperative if there really is a confession from another killer that would implicate himself in the murder of Viparat Marecek that he be permitted to testify as to a tremendous possibility of him being the killer.

Defense counsel then stated again that he “still [did] not have the confession to present to this court” However, counsel stated that:

our information is that . . . the man has stated in a confession that the first killing occurred shortly after his high school graduation, which was in later May of 1991, and he killed a middle-aged Oriental woman on the beach in North Carolina, and he lived in New Bern at the time.

Defendant did not provide an affidavit in support of his motion. *See Beck*, 346 N.C. at 756, 487 S.E.2d at 755 (stating that a motion for a continuance “should be supported by an affidavit showing sufficient grounds for the continuance” (internal quotation marks omitted)). Counsel admitted that he had not seen the confession, and did not indicate how he obtained the information regarding its content. Because “defendant failed to provide any form of detailed proof indicating sufficient grounds for further delay,” the motion was properly denied. *Id.*, 487 S.E.2d at 756 (internal quotation marks omitted).

II.

[2] Defendant next argues that the trial court erred in failing to exclude certain testimony of Ingeborg Shaw, Robert Preston, and Susan Kirk, on the ground that this testimony contained inadmissible hearsay statements. Specifically, defendant contends that these witnesses were allowed to testify to statements made by the victim about her suspicions that her husband was having an affair. Defendant

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argues that the statements do not fall within the hearsay exception provided in N.C. Rule of Evidence 803(3).

Rule 803 provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

....

- (3) Then Existing Mental, Emotional, or Physical Condition.—A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

....

N.C. Gen. Stat. § 8C-1, Rule 803 (2001). In *State v. Hardy*, 339 N.C. 207, 228, 451 S.E.2d 600, 612 (1994), our Supreme Court held that statements which “are merely a recitation of facts which describe various events” do not fall within the Rule 803(3) exception. The Court later clarified that statements of fact providing context for expressions of emotion are admissible under *Hardy*. See *State v. Gray*, 347 N.C. 143, 173, 491 S.E.2d 538, 550 (1997), *cert. denied sub nom. Gray v. North Carolina*, 523 U.S. 1031, 140 L. Ed. 2d 486 (1998), *stay allowed*, 354 N.C. 71, 553 S.E.2d 205 (2001), *stay lifted*, 355 N.C. 496, 564 S.E.2d 205 (2002). The Court distinguished the testimony in *Gray* from that in *Hardy* as follows:

Each of the witnesses testified as to the victim’s “state of mind,” that she was in fear for her life. The factual circumstances surrounding her statements of emotion serve only to demonstrate the basis for the emotions. Each of the witnesses testified that the victim had stated with specific reason and generally that she was scared of the defendant.

Id.

Defendant here argues that the testimony in question includes statements allegedly made to the witness by the victim, which merely recite facts and do not describe the victim’s state of mind. We disagree.

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Shaw, a neighbor and friend of Viparet, testified that Viparet had been at her house the morning before the Mareceks left for the beach. Shaw testified that Viparet was “very upset” when she left, that she was “very sad,” and “had tears in her eyes.” Shaw testified further that Viparet said “Inge, if I don’t come back—promise me this, Inge, if I don’t come back from the beach, call the police. Don’t let him get away with it.” Shaw then testified that she understood “him” to refer to defendant.

Defendant contends that this Court “has already found the admission of these statements constituted reversible error” in the previous appeal. Review of our previous opinion does not bear this out. We summarized the testimony from this witness that we characterized as “mere recitation of fact” as follows:

Inge Shaw testified that Viparet told her that defendant was having an affair with his cousin, that defendant was spending too much money in Czechoslovakia, including \$200.00 on English tapes for his cousin, that defendant didn’t kiss her when she made him a birthday cake, and that defendant didn’t touch her anymore.

Marecek I, 130 N.C. App. at 306, 502 S.E.2d at 636. This is not the same testimony about which defendant now complains. Unlike Shaw’s testimony in the most recent trial, the statements quoted above were inadmissible because they were “mere recitation of facts and were totally without emotion.” *Id.* (internal quotation marks omitted).

Shaw testified at the most recent trial to Viparet’s state of mind: she was upset and sad. The statement that Shaw should not “let him get away with it” implies fear or anger. We believe that these statements are “testimony that includes both statements of fact and emotion,” and are thus admissible. *Id.* Accordingly, the admission of Shaw’s testimony was not in error.

Defendant challenges the court’s admission of certain portions of Preston’s testimony, as follows:

A Colonel Marecek got on the phone and I spoke to him in Czech and said, “Colonel Marecek”—

Q What did you tell him at that time?

[DEFENSE COUNSEL]: Objection, hearsay, Your Honor.

THE COURT: Overruled.

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A I said, in Czech, "Colonel Marecek, this is . . . Sergeant Preston, we met out in '84 in DLI." And he replied, in English, "Oh, I remember." And I said, "Sir, please speak Czech, this is serious." He said, "Go on." At that time, I said, "Sir, I got a phone call last night from your wife, she's trying to get hold of my wife, who is a teacher out here at the Special Forces school, and she wants her to translate some letters to be used in a divorce proceeding against you."

Q What, if anything, did Colonel Marecek say to you at that time?

[DEFENSE COUNSEL]: Objection, Judge, it's hearsay.

THE COURT: Overruled.

THE WITNESS: Colonel Marecek said, "We need to get together. Do you have the letters?" "No, I don't." "Well, let's get together and talk about it." We agreed to meet that following weekend at the Green Beret Sport Parachute club on Fort Bragg.

Q And did you, in fact, meet with Colonel Marecek the following week?

A Yes, sir, my wife and I met Colonel Marecek in front of the—what we call Brown's Bruce, it's a big statute of a Green Beret there on Fort Bragg, and then we drove to the Green Beret Sport Parachute Club, went inside and sat down, had a few beers, and talked.

. . . .

Q And could you describe what happened when you met with Colonel Marecek at the Green Beret club?

A My wife and I sat down with him and talked about the conversation I had had with Mrs. Marecek, Mrs. Viparat Marecek. She was concerned about him having a mistress in Prague.

[DEFENSE COUNSEL]: Judge, I object. This is irrelevant, and it's hearsay.

THE COURT: Overruled.

THE WITNESS: And we explained that I didn't have the letters, but that she was pretty serious about this, very upset.

[DEFENSE COUNSEL]: Judge, I object again, hearsay.

THE COURT: Overruled.

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THE WITNESS: She was very upset about the letters and concerned about his relationship with this woman in the Czech Republic.

[DEFENSE COUNSEL]: I would renew my objection, Your Honor. It's hearsay.

THE COURT: Overruled.

Preston testified that defendant expressed a desire to see the letters. Preston further testified that he called Viparet and asked her to bring him the letters, and she responded, "No, no, don't call me here." Preston then testified, over objection, that he told defendant about a call he received from Ingeborg Shaw. Preston testified that he told defendant, "I've been called by Mrs. Inge Shaw and she said to be very careful, that you don't want to get her in any trouble, she's very scared about this."

Again, this testimony contains statements of emotion as well as factual content. According to *Hardy*, statements of this kind are admissible. Thus, the trial court did not err. *See id.*

Defendant also objected to the admission of statements of Susan Kirk, although he does not specify which of Kirk's statements he finds objectionable. Defendant objected at trial to Kirk's testimony regarding statements that Kirk made to Viparet. Because Kirk was testifying to her own statements, these statements were not hearsay statements. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c) (2001). Defendant contends in his Reply Brief that "the statements made by witnesses to the victim presupposed comments she would have made to them about defendant's conduct," and thus, "the challenged testimony essentially revealed the victim's statements which did not show her state of mind, but, suggested defendant's extramarital misconduct." We find this argument to be without merit.

III.

[3] Defendant next argues that the trial court erred in giving an instruction on implied admissions because the evidence did not support the instruction. After the court allowed counsel to review the court's proposed jury instructions, the following colloquy ensued:

[DEFENSE COUNSEL]: For the record, we would object to the instruction on implied admission. We do not feel it is appropriate in this case and, furthermore, that the evidence that was

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presented in the case does not justify the giving of the instruction. In fact, Ms. Kirk said that when she made the statement to Mr. Marecek that his response was such that it was a denial.

THE COURT: What about Mr. Preston and his testimony? The record will reflect your objection, but I believe it's appropriate, and I'm going to give it. So the objection is overruled.

The court gave the following pattern jury instruction:

If a statement is made by another person in the presence of the defendant, under such circumstances that a denial would naturally be expected from the defendant if the statement was untrue, and it is shown that the defendant was in a position to hear and understand what was said and had an opportunity to speak, but failed to do so, then his failure to deny the statement would constitute an implied admission.

If you find that the defendant made such an implied admission, then you should consider all of the circumstances under which it was made, in determining whether it was a truthful admission and the weight you will give it.

Pursuant to the North Carolina Rules of Evidence, "[a] statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . . a statement of which he has manifested his adoption or belief in its truth." N.C. Gen. Stat. § 8C-1, Rule 801(d)(B) (2001). "A person may expressly adopt another's statement as his own, or an adoptive admission may be inferred from 'other conduct of a party which manifests circumstantially the party's assent to the truth of a statement made by another person.'" *State v. Sibley*, 140 N.C. App. 584, 588, 537 S.E.2d 835, 839 (2000) (quoting *FCX, Inc. v. Caudill*, 85 N.C. App. 272, 278, 354 S.E.2d 767, 772 (1987)). "Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior." *State v. Thompson*, 332 N.C. 204, 218-19, 420 S.E.2d 395, 403 (1992) (quoting N.C.G.S. § 8C-1, Rule 801(d) official commentary).

The testimony of Preston relating to an implied admission is the following:

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A I told [defendant], "George, I'm getting—this is starting to stink, it smells real bad. You're not as smart as you think you are. I know you did it, I know you killed her. Please don't tell"—

Q Who were you referring to at that time?

A I was referring to the murder of Viparat Marecek.

Q And continue. What happened after that?

A I told him I didn't want to know. I knew, but I didn't want him to tell me. I said, "You're pretty stupid. You've gone on around the world cruises for \$20,000, you bought a new Cadillac, you're upgrading your house for \$200,000. Just because you weren't able to buy your position in the Czech ministry of defense, doesn't mean you need to live like this. It's starting to stink. You're not as smart as you think you are. People are going to—the man is going to knock on your door."

Q And what, if anything, did he say to you at that time?

A I was being pretty forceful with him, and every time I would tell him, you know, hey, you know, you're buying a new car, this is stupid, your insurance money, redoing your blacktop driveway, this is starting to stink. "Ah, they've got nothing on me. They can't catch me." At the end of the conversation when I said, "They're going to dig her up, they'll find some forensic—some scientific evidence to convict you," he said, "They can't, I burned her body, sent her back." And then he reached over and grabbed me, real strong grip, and he was in his cups, and said, "They'll never catch me, I'm too smart for them."

Q Did he ever deny killing Viparat at that time?

A No.

Defendant relies on *State v. Spaulding*, 288 N.C. 397, 219 S.E.2d 178 (1975), *vacated in part on other grounds sub nom. Spaulding v. North Carolina*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976), to argue that an implied admission instruction here constituted error. *Spaulding*, however, did not involve a jury instruction. Rather, at issue was the admissibility of a statement allegedly adopted by the defendant. Here, defendant did not object to the testimony when it was offered at trial, nor does he now argue that the testimony was inadmissible. Instead, he argues that the statement did not support giving a jury instruction on implied admission. We conclude that the testimony contained both express and implied admissions and did support the instruction.

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In *Spaulding*, the Supreme Court stated:

Implied admissions are received with great caution. However, if the statement is made in a person's presence by a person having firsthand knowledge under such circumstances that a denial would be naturally expected if the statement were untrue and it is shown that he was in position to hear and understand what was said and had the opportunity to speak, then his silence or failure to deny renders the statement admissible against him as an implied admission.

Id. at 406, 219 S.E.2d at 184. Defendant contends that Preston did not have "any knowledge of the facts," as required by *Spaulding*. *Spaulding* is inapposite here, however, because *Spaulding* addressed a situation where a defendant was silent in the face of a statement. *See id.* When a defendant is silent in the face of a statement, the inference that the defendant agrees with that statement is a difficult one to draw. Here, defendant was not silent. On the contrary, he allegedly responded, "They can't [find evidence], I burned her body, sent her back They'll never catch me, I'm too smart for them." Defendant's reported failure to deny that he killed his wife, along with these incriminating statements, "manifest[] circumstantially [his] assent to the truth" of Preston's statement that defendant killed his wife. *Sibley*, 140 N.C. App. at 588, 537 S.E.2d at 839 (internal quotation marks omitted).

We hold that Preston's testimony supported the trial court's instruction on implied admissions. Thus, we need not address Kirk's testimony, to which defendant also objected at trial.

IV.

[4] Defendant contends that the trial court erred by preventing him from offering testimony from two witnesses to bolster his own credibility. Defendant did not testify. However, the prosecution introduced the written statements made by defendant to police, and then later offered evidence contrary to defendant's statements. Thus, defendant argues, his credibility was put at issue, and he should have been allowed to offer evidence of his character for truthfulness.

Defense counsel first attempted to elicit Alphonso Woodall's opinion of defendant's reputation for truthfulness and honesty, but the court sustained the State's objection. The court held a bench conference, but the defense made no proffer.

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Then, after a similar ruling, defense counsel asked for and was allowed the opportunity to make a proffer of Lupiak's testimony to the same effect. That testimony is as follows:

Q Sergeant Major Lupiak, do you have, based upon your observation of Colonel Marecek and your knowledge of his reputation, do you have an opinion, satisfactory to yourself, as to his truthfulness and veracity?

A I do.

Q Can you state that opinion, please?

A Yes, I can.

Q Would you please state it?

A I believe George is probably one of the most truthful and down-to-earth type individuals I've run across in many, many years. He's a straight down the line individual. He would do nothing to desecrate his integrity. He's—anything he does has always been above reproach in his actions in the military as well as what I've seen on the civilian side of the house, as well. He's just—and you know, I'm not saying this because I'm European, but George and I were brought up in the same type of lifestyle, and we were taught to be truthful, to be honest, and to be aboveboard, and that's why George is the decorated hero he is, because he put other personnel above himself. He did those things, and those are some of the things I highly respect George for because, after what he did in combat situation, as well.

Q And do you also have an opinion, satisfactory to yourself, concerning George Marecek's character trait for being a peaceful and law-abiding citizen?

A Yes, I do.

Q Can you state that opinion, please?

A George—the only time I've ever seen George in anything that's not peaceful is when he gets upset when somebody goofs up in the military and does something that is stupid. He would get upset, because he wanted to make sure it was on the right track and it was the right way to do the thing; and, other than that, I've never seen him—I've never really seen him lose his temper. He gets angry, like anybody else, but not to the point where it was

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extreme, just because it's human nature and it was from something that was done dumb by somebody else.

Lupiak did testify before the jury to defendant's honorable service in the military, and to his opinion that defendant was law-abiding and a man of integrity.

Defendant's statements to police officers were hearsay, but they were admissible as admissions of a party-opponent. *See* N.C.G.S. § 8C-1, Rule 801(d). Hearsay statements are subject to the same rules governing impeachment or corroboration as other statements. *See State v. Stevens*, 295 N.C. 21, 33, 243 S.E.2d 771, 779 (1978).

A witness' credibility may not be supported until after that witness' character for truthfulness has been attacked. *See* N.C. Gen. Stat. § 8C-1, Rule 608(a)(2) (2001). We agree with defendant that his character for truthfulness was impugned by the introduction of evidence contrary to his written statement that he gave to police. *See State v. Bethea*, 186 N.C. 22, 24, 118 S.E. 800, 800 (1923) ("This Court has often held that whenever a witness has given evidence in a trial and his credibility is impugned . . . by testimony contradicting his . . . , it is permissible to corroborate and support his credibility by evidence tending to restore confidence in his veracity and in the truthfulness of his testimony."); 1 *McCormick on Evidence* § 33, at 124 (John W. Strong ed., 5th ed. 1999) (observing that one main method of attacking a witness' credibility is "proof by other witnesses that material facts are otherwise than as testified to by the witness under attack"). Therefore, even though defendant did not testify, his credibility was impugned, and he should have been allowed to offer evidence regarding his character for truthfulness.

Although we believe that the trial court erred in refusing to allow the admission of the testimony, we do not find that this error warrants a new trial. To establish prejudice, a defendant has the burden of showing that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C. Gen. Stat. § 15A-1443(a) (2001). Defendant has failed to carry his burden.

Defendant contends that this error was prejudicial because evidence of defendant's "stellar reputation for truthfulness" would have encouraged the jury to believe his account over the circumstantial evidence of the State. Thus, defendant's argument that he was prejudiced by the exclusion of this testimony is based on the assumption that the testimony would have enhanced the weight of his written

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account of events. We note that, because defendant made no proffer of the testimony Woodall would have given, we can only consider Lupiak's proposed testimony in our analysis.

We find that the exclusion of Lupiak's testimony was not prejudicial for two reasons. First, defendant put on testimony from several witnesses that was consistent with his statement that he returned to the beach after lunch. Both Thai Truong and Susan Abe testified that defendant and Viparet were together on the beach on the morning of Monday, 3 June 1991, but that defendant was alone on the beach in the afternoon and remained there until 5:00. David Kelly testified that he saw Viparet walking alone on the road that led from her cottage towards the beach between 3:15 and 3:45 on Monday afternoon. Richard Tobin testified that he saw Viparet when he was leaving the reception center and she was coming in, at about 4:00 p.m. that afternoon. Tobin then passed Viparet again at about 4:25 p.m. Thus, defendant's story was corroborated by other witnesses. Moreover, the defense effectively cross-examined the State's witnesses, whose accounts of defendant's whereabouts differed. Evidently, the jury chose to discount the testimony of defendant's witnesses. We are not persuaded that there is a reasonable possibility that the jury would have believed this testimony, as well as defendant's account, simply because they heard Lupiak's testimony that defendant had a "stellar reputation" for honesty.

Second, although the State's case was circumstantial, the State did present evidence that was quite damning to defendant. In particular, Russell Preston testified that he had the following exchange with defendant:

I was being perfectly forceful with him, and every time I would tell him, you know, hey, you know, you're buying a new car, this is stupid, your insurance money, redoing your blacktop driveway, this is starting to stink. "Ah, they've got nothing on me. They can't catch me." At the end of the conversation when I said, "They're going to dig her up, they'll find some forensic—some scientific evidence to convict you," he said, "They can't, I burned her body, sent her back." And then he reached over and grabbed me, real strong grip, and he was in his cups, and said, "They'll never catch me, I'm too smart for them."

The defense attacked Preston's credibility on cross-examination, and Lupiak, who worked closely with Preston for approximately two years, testified to his opinion that Preston was untruthful.

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Nevertheless, the jury, in convicting defendant, apparently believed Preston's testimony. Additionally, Inge Shaw testified that Viparet was fearful that she would not return from the trip to the beach and that Viparet instructed Shaw to call police and not "let him [defendant] get away with it." Defendant challenged the court's admission of both portions of testimony, but we have rejected those arguments.

We do not think there is a reasonable possibility that the jury would have acquitted defendant on the basis of one witness' testimony that defendant had a stellar reputation for honesty. *Cf. State v. Murray*, 27 N.C. App. 130, 132-33, 218 S.E.2d 189, 191 (1975) (finding prejudicial trial court's error in excluding testimony that would have impeached witness whose testimony constituted the only evidence connecting defendant to crime). Accordingly, this assignment of error is overruled.

V.

[5] Defendant argues that the trial court erred in overruling his objections to evidence that defendant owned a club or nightstick. Specifically, defendant objects to the following testimony of his son:

Q All right, sir. Now, Mr. Marecek, I'll ask you when you were living in Germany, did you see your father in possession of a nightstick or club?

[DEFENSE COUNSEL]: Objection as to relevancy, Your Honor.

THE COURT: Overruled.

THE WITNESS: Yes, sir, I did. It was probably 12, 14 inches long, black, I thought, military-style nightstick.

Q How heavy was the stick you saw? Strike that. Was it heavier on one end than the other?

A Right. The bigger end, the hitting end, was weighted, versus the hand end.

Q Did you ever handle that nightstick yourself?

A One time I took it out and broke some bottles with it.

Q Now, what about what year would it have been that you had seen it over in Germany?

A Probably '69 or '70.

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Q Now, when is the last time you saw that nightstick, Mr. Marecek?

A Probably in 1988.

Q Where were you then when you saw it, it you recall?

A At my sister's house.

....

Q Where did you see it when you saw it on that occasion?

A In the trunk of my father's car.

Defendant also objects to Russell Preston's testimony about the stick. Preston had been describing several encounters he had with defendant in May 1991 concerning some letters that defendant's wife wanted to have translated. Preston then recalled the following interchange between defendant and himself:

Q And what, if anything else, happened at that point in time?

A When I mentioned Inge Shaw—and again, I had never met Mrs. Shaw to this point—he had said—he says, “F-ing bitch, I’m getting tired of her crap.” And again, we were up in the garage at his home. And then he had—I said, “You got to watch out, Sergeant Major Mafia is in Force.”

Q Why did you say that?

A Because Special Forces is a close-knit community, and there's always a little bit of conflict, if you will, between the officers and the enlisted swine. And I told him, “You need to be careful of the Sergeant Major Mafia,” and he reached under the front seat of his car, or somewhere in the front—and pulled out a club and whacked it on his leg and says, “I’m not worried about them, I got something for them.”

Q Can you describe the club that he pulled out?

A Not very well, sir, it was dark in the garage, it was—he had it in his hand, and it stuck out several inches, and looked to be thin, about finger size in length, maybe perhaps a little bit bigger, and made a nice pop when he whacked it on his pant leg.

Finally, defendant objects to the testimony about the club by Richard McCall, a good friend and neighbor of defendant and his wife. McCall testified as follows:

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Q Now, if I could direct your attention back to a period of time, approximately 1986 or 1987, did you have an occasion to go with Mr. Marecek into his—the garage of his home in Fayetteville?

A Yes, I did.

Q And could you tell the jury the circumstances surrounding that?

A The precise circumstances, I do not recall, except that the entrance to the Marecek's home, normally for, I guess, for informal visitors like us, was through the back door, and the back door was adjacent to the garage. And on this occasion, I remember going into Colonel Marecek's garage, and he was telling me that he was not concerned with being involved in—involved with being stopped by bad guys because he had something for them. And he opened up his car door and he reached either under the seat or into the glove compartment, I couldn't tell which, and he pulled out an item and said, "I have this," and he handed it to me, and it was what I would call a billy club or a blackjack.

Q Could you describe how large this billy club or blackjack was, Colonel McCall?

A Yes. My memory is that it was probably eight to twelve inches in length. The base of it seemed to be—it was a rod, a lead rod, or a heavy metal rod, as big or bigger than my finger. As I recall, it was wrapped with intertwined or interlacing leather, and I recall it had a strap so you could strap it on to your hand, and I remembered how remarkably heavy it was, for such a short item to be so—to be so heavy.

Q And after Colonel Marecek gave you this blackjack, did you give it back to him?

A Yes, I did. I hit it on my hand, and I thought, this thing is pretty powerful, this is a powerful weapon. I gave it back to him.

Q Did you see where he put it after you gave it back to him?

A He put it back into his automobile.

Defendant did not assign error to the admission of the testimony about the club recounted above. He states in his brief that he "is moving to amend the record on appeal to add this assignment of error." However, the court has received no formal motion from

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defendant. In the exercise of our discretion, however, we address this assignment of error. *See* N.C.R. App. P. 2.

Defendant argues that this testimony should not have been admitted because it was not relevant. *See* N.C. Gen. Stat. § 8C-1, Rule 402 (2001). We note that defendant did not argue at trial, nor does he argue now, that admission of this testimony violated Rule 403 or any other rule of evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2001). We disagree that this evidence was irrelevant.

Evidence is “relevant” if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2001). Generally, all relevant evidence is admissible. *See* N.C.G.S. § 402. Our Supreme Court has stated that “in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible.” *State v. Bruton*, 344 N.C. 381, 386 474 S.E.2d 336, 340 (1996) (internal quotation marks omitted).

“Whether the evidence should be excluded is a decision within the trial court’s discretion. Hence, the trial court’s decision will not be disturbed, unless it is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Burgess*, 134 N.C. App. 632, 635, 518 S.E.2d 209, 211-12 (1999) (citation and internal quotation marks omitted).

Dr. Robert Thompson, who performed the autopsy on Viparet, testified that she had several lacerations and abrasions on her head and face and a hairline fracture on her skull, all of which were inflicted with a blunt object. He testified that she also had defensive wounds on her hands and arms. Dr. Thompson testified that, although these wounds would not have been fatal, the victim “might have been knocked unconscious, or they could have been just, you might say, out a little bit and not been unconscious.” In his opinion, the cause of death was drowning.

The witnesses’ testimony that defendant, as recently as a month before the murder, kept a nightstick in his car is relevant to the State’s theory that defendant inflicted the blunt-force injuries on his wife, and then caused her to drown. It tended to show that he possessed an instrument that could have been so used. Defendant argues that the nightstick was irrelevant because the State did not connect the nightstick to the murder. Defendant’s position is undermined by *Bruton*, cited by defendant. In *Bruton*, the defendant argued that the trial

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court should not have admitted certain evidence, including numerous nine-millimeter cartridges, that had been seized from his residence. The Court held that

[t]he evidence at trial did not link any of the items seized at defendant Bruton's residence with the killing of the victim. However, the extensive inventory of nine-millimeter cartridges found at defendant Bruton's residence supported that State's theory that defendant Bruton owned a nine-millimeter weapon, used it in the killing of the victim, and disposed of it after the killing. For this reason the nine-millimeter cartridges were relevant and admissible.

Bruton, 344 N.C. at 386-87, 474 S.E.2d at 340-41. Similarly, the evidence regarding defendant's possession of a nightstick supported the State's theory that defendant injured his wife with a blunt object and then caused her to drown.

Defendant also cites *State v. Patterson*, 59 N.C. App. 650, 297 S.E.2d 628 (1982), in support of his position. However, the issue in *Patterson* was whether it was error to admit a weapon itself into evidence when there was no evidence connecting the weapon that was admitted to the weapon used to commit the crime. *See id.* at 653, 297 S.E.2d at 630. Here, the nightstick was not admitted into evidence.

We conclude that the trial court did not abuse its discretion in allowing the testimony into evidence. Accordingly, this assignment of error is overruled.

VI.

Finally, defendant argues that the trial court erred in sentencing him in excess of the presumptive range because the aggravating factor found by the court was not supported by the evidence, and the court failed to find a statutory mitigating factor that was supported by uncontradicted evidence. Although we disagree with defendant that the trial court erred in failing to find a statutory mitigating factor, we agree that the court erred in finding an aggravating factor that was unsupported by the evidence.

[6] Because defendant was sentenced for a crime that occurred prior to 1 October 1994, he was sentenced under the Fair Sentencing Act. *See* N.C. Gen. Stat. § 15A-1340.10 (2001). Defendant argues that the trial court erred in failing to find that he lacked any criminal convictions. *See* N.C. Gen. Stat. § 15A-1340.4(a)(2)(a) (1988). Joseph Lupiak

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testified that defendant is a law-abiding citizen who would do nothing to harm his integrity. Defendant characterizes this testimony as “substantial, uncontradicted evidence that he had no record of criminal convictions.” We disagree.

The burden is on the defendant to establish a mitigating factor by a preponderance of the evidence. *See State v. Crisp*, 126 N.C. App. 30, 41, 483 S.E.2d 462, 469, *appeal dismissed and disc. review denied*, 346 N.C. 284, 487 S.E.2d 559 (1997). Our Supreme Court has explained that uncontradicted evidence is not necessarily sufficient to meet the defendant’s burden of proof:

[U]ncontradicted, quantitatively substantial, and credible evidence may simply fail to establish, by a preponderance of the evidence, any given factor in aggravation or mitigation. While evidence may not be ignored, it can be properly rejected if it fails to prove, as a matter of law, the existence of the mitigating factor.

State v. Blackwelder, 309 N.C. 410, 419, 306 S.E.2d 783, 789 (1983). Here, the defendant did not present any direct evidence regarding his criminal record. Accordingly, the trial court did not err in failing to find as a mitigating factor that the defendant had no criminal record.

[7] Defendant argues that the trial court erred in finding as an aggravating factor that he took advantage of a position of trust or confidence. *See* N.C. Gen. Stat. § 15A-1340.4(a)(1)(n) (1988); *see also* N.C. Gen. Stat. § 15A-1340.16(d)(15) (2001) (same factor under Structured Sentencing). Defendant contends that there was insufficient evidence supporting this factor. We agree.

“The State bears the burden of persuasion on aggravating factors by a preponderance of the evidence.” *Crisp*, 126 N.C. App. at 37, 483 S.E.2d at 467. Citing *State v. Arnold*, 329 N.C. 128, 144, 404 S.E.2d 822, 832 (1991), the State asserts that the evidence shows defendant “lead [sic] his wife to believe everything was fine in their marriage and took advantage of a long-planned family vacation to lure her to the beach and end her life in order to collect the proceeds from a life insurance policy and to marry his mistress.” However, our Supreme Court stated in *Arnold* that while “the husband-wife relationship permits the finding” of this aggravating factor, “[i]n some marriage-related situations, finding this aggravating factor may be inappropriate.” *Id.* The Court held that the evidence in *Arnold* warranted finding the aggravating

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factor because the husband-victim “did not distrust his wife, but rather believed that she had ‘come to her senses’ and ended her relationship with [another man].” *Id.* Significantly, there was evidence to show that the defendant in *Arnold* plotted with another man to send her husband to a church on a pretense to retrieve her purse, where he was murdered. *See id.* at 133-37, 483 S.E.2d at 825-28. Furthermore, in *State v. Mann*, 355 N.C. 294, 560 S.E.2d 776 (2002), our Supreme Court noted that “[o]ur courts have upheld a finding of the ‘trust or confidence’ factor in very limited factual circumstances.” 355 N.C. at 319, 560 S.E.2d at 791.

In contrast to the evidence in *Arnold*, the evidence here suggests that Viparet distrusted defendant and feared him. There was no evidence showing that defendant exploited his wife’s trust in order to kill her. We conclude that the trial court erred in finding this aggravating factor. *See id.*, 560 S.E.2d at 791-92 (collecting cases). Therefore, defendant is entitled to a new sentencing hearing. *See State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983) (holding that “in every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing”).

No prejudicial error at trial, remanded for resentencing.

Chief Judge EAGLES and Judge BRYANT concur.

STATE OF NORTH CAROLINA v. FRANKIE RAY SMITH

No. COA01-1154

(Filed 3 September 2002)

1. Evidence— indecent liberties prosecution—possession of pornography—nonprejudicial error

The trial court in a prosecution for indecent liberties and first-degree sexual offense erred in the admission of defendant’s possession of pornographic magazines and videos where there was no evidence that defendant had viewed the materials with the victim, nothing more than speculation that defendant asked the victim to view the materials, the testimony which the

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materials were supposed to corroborate was never presented to the jury, and defendant did not waive his objection by testifying about the material on cross-examination because he had timely objected when the State began the line of questioning. However, this error was not prejudicial because there was no reasonable possibility of a different result without the evidence.

2. Evidence— indecent liberties—victim watching movie about false accusation—excluded

There was no error in a prosecution for indecent liberties and first-degree sexual offense in the exclusion of evidence that the victim had watched a movie in which a girl with an unrequited crush on an older man made a false accusation of rape. There was no testimony tending to show that the details of the movie's plot were similar to the facts of this case, and there was no evidence that the victim had discussed the movie with others or had indicated that the movie led her to consider making an accusation against defendant.

3. Appeal and Error— exclusion of testimony—no request to reconsider ruling—waiver

The defendant in a prosecution for indecent liberties and first-degree sexual offense waived the right to argue on appeal that the court erred by excluding testimony by a neighbor of the victim that the victim had falsely accused him of an improper touching four years earlier where defendant failed to request the court to reconsider its ruling prohibiting testimony by the neighbor after the court changed its earlier ruling to permit questioning of the victim about the prior accusation.

4. Evidence— indecent liberties—sexual offenses—child victim—prior sexual misconduct with babysitter

Evidence that defendant had previously engaged in sexual misconduct with a 15-year-old babysitter was admissible under Rule 404(b) in a prosecution for taking indecent liberties and sexual offense with his 12-year-old stepdaughter to show the absence of mistake and defendant's plan, scheme or design. N.C.G.S. § 8C-1, Rule 404(b).

5. Criminal Law— presence at trial—defendant nauseated—continuance denied

The trial court did not violate a defendant's right to be present at trial by refusing to grant a continuance and refusing

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to grant a mistrial where defendant complained of nausea, was examined by a doctor who recommended that the trial not continue that day, defendant was given medicine which he indicated made him sleepy, and the court made its decision based on personal observation of defendant.

Appeal by defendant from judgments entered 16 March 2001 by Judge W. Russell Duke, Jr., in Dare County Superior Court. Heard in the Court of Appeals 23 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General Jill B. Hickey, for the State.

Cheshire, Parker, Schneider, Wells & Bryan, by Joseph B. Cheshire, V, and John Keating Wiles, for defendant-appellant.

CAMPBELL, Judge.

Defendant was indicted on two counts of taking indecent liberties with a child and one count of first degree sex offense with a female child under the age of thirteen. Following a jury trial, defendant was convicted on all three counts. Defendant was sentenced to three concurrent terms of imprisonment. Defendant appeals.

The State's evidence tended to show that the alleged victim, "A.R.," was twelve years old at the time of the alleged sexual offenses and fourteen years old at the time of the trial. A.R. testified that defendant, her stepfather, often made comments about the way she dressed ("[Y]ou should wear pants that are tighter because they look better on your butt."), about her breasts, and about her "butt." These comments made A.R. feel uncomfortable. On 22 February 1999, A.R.'s mother spent the night away from home, while A.R. stayed at home with defendant and defendant's daughter, Julie. Sometime around midnight, A.R. was lying in bed when she heard defendant come down the hallway and into her bedroom. Defendant allegedly pulled down the covers, ran his hand up A.R.'s shirt, and rubbed her left breast for approximately ten minutes. A.R. did not move and did not let defendant know that she was awake because she was afraid that he would hurt her. A.R. did not initially tell anyone about this first alleged incident of sexual abuse.

The second alleged incident of sexual abuse occurred on 1 April 1999. A.R. testified that her mother had not returned home from work and that she and Julie were packing for a trip to Virginia. A.R. went

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into defendant's bedroom to tell him that Julie's bed had broken. A.R. sat down on the hope chest while defendant was lying in bed watching television. A.R. testified that she got a cramp in her calf and started rubbing it. Defendant then picked her up from the hope chest and laid her on the bed on her stomach. Defendant began rubbing her calf and then "worked his way up and into [her] shorts and into [her] underwear." Defendant then stuck his finger in A.R.'s vagina and kept it there for "maybe five minutes." After he removed his finger from A.R.'s vagina, defendant asked her, "Are you mad at me? Did I hurt you? Are you mad at me, [A.R.]" A.R. pretended to be asleep because she was afraid of what defendant might do to her. Defendant went into the bathroom and A.R. remained on the bed pretending to be asleep. When defendant came out of the bathroom, he again asked, "[A.R.], are you mad at me? [A.R.], did I hurt you?" A.R. continued to act as if she were asleep. Defendant then picked her up, carried her into her own bedroom, and laid her on the bed.

Jacqueline Joiner ("Jacqueline"), A.R.'s aunt, testified that A.R. told her about the April 1 incident approximately three days after it occurred. According to Jacqueline's testimony, A.R.'s exact words to her were, "[Defendant] stuck his finger in me." Jacqueline told A.R.'s mother, Denise Joiner, about the alleged April 1 incident the following day.

Denise Joiner ("Denise") testified that she remembered coming home on the night of 1 April 1999 and noticing that A.R. had been crying. Denise asked what was wrong, to which A.R. responded, "I just don't feel well, mom . . . I just—I don't know, I just don't feel good." Denise further testified that, when she questioned A.R. about the alleged April 1 incident, A.R. described the incident consistently with her testimony at trial. Denise reported the alleged sexual abuse to the Dare County Sheriff's Office and took A.R. to see a therapist. During the investigation, A.R. reported the alleged February incident in which defendant had rubbed her left breast.

Two of defendant's co-workers, Jeff Moss ("Moss") and Donald Rouse ("Rouse"), also testified for the State. Both Moss and Rouse testified that defendant had made sexual comments about A.R. while at work. Moss testified that defendant had made comments about A.R.'s breasts and "how well she looked for her age," and that defendant told him that he had once become aroused due to the T-shirt and underwear that A.R. wore around the house. Further, Moss testified that defendant had made the comment "that there was no blood in the child to him, that it could lead to something."

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Rouse also testified that defendant made comments about A.R.'s breasts. In addition, Rouse testified that defendant told him of an occasion on which A.R. got out of the shower and was walking through the living room with an oversized T-shirt on and that defendant made the comment "that if she didn't stop dressing like that that something was going to happen." Rouse further testified that defendant once made the comment, "Old enough to bleed, old enough for me." As a result of defendant's sexual comments, Rouse filed a complaint against defendant with social services.

Michelle Zimmerman ("Zimmerman"), a psychiatrist certified as a specialist in child psychiatric nursing and tendered and accepted as an expert in child sexual abuse, testified that she examined A.R. over the course of several months beginning in August 1999. Zimmerman stated that A.R. told her that defendant had come into her room in February and put his hands up her sweatshirt, and that on 1 April 1999 she had been digitally penetrated by defendant. Zimmerman diagnosed A.R. as suffering from post-traumatic stress disorder, and testified that sexual assault was a common cause of post-traumatic stress disorder. Zimmerman further testified that it was not unusual for a child sexual abuse victim not to immediately disclose the abuse due to fear of getting in trouble or retaliation.

Jennifer Marquis ("Marquis") also testified for the State. Marquis stated that she knew defendant when she was a teenager and would occasionally babysit for him. On one occasion when Marquis was fifteen years old, she went over to defendant's house to babysit. Defendant left for a short time and then returned to fix supper. Marquis and defendant ate supper and defendant made them mixed drinks. After drinking a mixed drink, Marquis went out on the patio with defendant and smoked some marijuana. The two then came back inside and defendant started trying to fool around with Marquis but Marquis was not interested. Defendant pulled Marquis' pants off and performed oral sex on her. Marquis testified that she did not want defendant to do so but that she did not fight him off. The next day Marquis was lying on defendant's bed while he took a shower. When he got out of the shower, defendant lay down beside Marquis and began trying to talk her into "doing stuff." Marquis again told defendant that she did not want to mess around with him. Nonetheless, defendant pulled Marquis' pants down and had sexual intercourse with her. Marquis testified that she told defendant she did not wish to have sex with him, but that she did not "hit him or anything like that" in an attempt to fight him off. Marquis did not report her two sexual

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encounters with defendant until the investigation of defendant's alleged sexual abuse of A.R. She testified that she did not feel like she had been raped and that she felt she had put herself in position to allow defendant's actions to occur. She further testified that she continued to see defendant from time to time following the two sexual encounters but that she never had another sexual encounter with him. Marquis' testimony was admitted under Rule 404(b) of the North Carolina Rules of Evidence for the purpose of showing an absence of mistake on the part of defendant, defendant's unnatural attraction to young girls, and a common plan or scheme to take advantage of young girls in situations where he had parental or adult responsibility over them.

Over defendant's numerous objections, the State also admitted testimony concerning defendant's possession of pornographic magazines and videos at home and at work.

Defendant denied all allegations of sexual misconduct and presented witnesses who testified about his reputation. Defendant also presented testimony attacking the credibility of several of the State's witnesses, including the victim, Donald Rouse and Jennifer Marquis. Defendant contended that A.R. had fabricated the allegations against him and that A.R. had previously made false accusations of a somewhat similar nature against another man.

Defendant raised twenty-six assignments of error in the record on appeal, several of which defendant has failed to support with argument in his brief. Those assignments of error are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6) and we only address those assignments of error brought forward in defendant's brief.

[1] Defendant first contends that the trial court erred in admitting evidence of his possession of pornographic magazines and videos. Defendant contends that such evidence was not relevant to the question of whether defendant committed the alleged sexual offenses, and in the alternative, even if the evidence were relevant, its probative value was substantially outweighed by the danger of unfair prejudice under Rule 403 of the North Carolina Rules of Evidence. Defendant additionally alleges that "[t]he only purpose of such inquiries was to besmirch the Defendant's character."

The State argues that defendant waived his right to object to the admission of the evidence concerning his possession of pornographic magazines and videos, and in the alternative, the evidence was rele-

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vant and admissible under Rule 404(b) to show “defendant’s intent to engage in a sexual relationship with [A.R.].” The State additionally contends that the evidence was admissible to corroborate the *voir dire* testimony of Jennifer Marquis.

On direct examination, the State asked A.R. if defendant had ever asked her to look at a pornographic videotape. A.R. testified that defendant once handed her a video and said, “Watch this.” A.R. asked defendant what the video was and defendant responded, “Just watch it.” A.R. testified that she refused to watch the video because she *thought* it was a pornographic movie. Defendant’s timely objection to this testimony was overruled by the trial court. A.R. was then asked, again over defendant’s timely objections, if she knew whether defendant kept pornographic videos and magazines in the house. A.R. responded, “I *think* so, I’m almost positive.” The trial court then allowed defendant’s motion to strike to A.R.’s speculation that she *thought* defendant kept pornographic videos and magazines in the house.

The State also questioned A.R.’s mother, Denise Joiner, about whether defendant kept pornographic videos and magazines in the house and whether he watched the videos. Over defendant’s timely objections, Denise answered in the affirmative to both questions. Denise described the pornographic magazines as “Playboy, Hustler-type magazines.”

The State also questioned two of defendant’s co-workers, Jeff Moss and Donald Rouse, about whether defendant kept pornographic magazines at his workplace. Defendant again objected and the co-workers testified that defendant kept pornographic magazines in his toolbox. Defendant’s sister, Serena Sellers, was also questioned by the State whether defendant kept pornographic materials in the townhouse in which the two of them lived. As with the other instances, defendant made a timely objection.

During the State’s cross-examination of defendant, he was asked whether he kept pornographic magazines and videotapes in the house he shared with A.R. Defense counsel again objected and was overruled. Defendant then answered the State’s questions in the affirmative but asked if he could explain his answer, which the trial court allowed. Defendant then testified:

I have two—I had three years of Playboy magazines still in the plastic, okay, for purposes of collector items or what not. I had

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these magazines since the first three months I lived with Denise and [A.R.]. I had these things packed in a box about yea big (demonstrating) wrapped in duct tape. They stayed in the shed out back away from the house in Chesapeake and downstairs where you drive your car up underneath the beach box-type house we lived in there was four storage doors. That is where that box with the two movies and the pornographic magazines were packed up.

Defendant went on to testify that he had one pornographic magazine in the house, but no pornographic videos, and that he had never asked A.R. to watch at a pornographic video. Defendant also testified that he had one Penthouse magazine in his toolbox at work.

Under Rule 401 of the North Carolina Rules of Evidence, “ ‘[r]elevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. R. Evid. 401 (2001). As a general rule, evidence of a defendant’s prior conduct, such as the possession of pornographic videos and magazines, is not admissible to prove the character of the defendant in order to show that the defendant acted in conformity therewith on a particular occasion. N.C. R. Evid. 404(b) (2001). However, such evidence of prior conduct is admissible so long as it is relevant to some purpose other than to show the character of the defendant and the defendant’s propensity for the type of conduct for which he is being tried. *See State v. Rael*, 321 N.C. 528, 534, 364 S.E.2d 125, 129 (1988); *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986); *State v. Doisey*, 138 N.C. App. 620, 626, 532 S.E.2d 240, 244, *disc. review denied*, 352 N.C. 678, 545 S.E.2d 434 (2000), *cert. denied*, 531 U.S. 1177, 148 L. Ed. 2d 1015 (2001). Examples of such proper purposes include “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident.” N.C. R. Evid. 404(b).

After careful review of the record, we are unable to agree with the State’s contention that the evidence of defendant’s possession of pornographic magazines and videos was properly admitted as evidence of “defendant’s intent to engage in a sexual relationship with [A.R.],” or as evidence of defendant’s preparation, plan, knowledge or absence of mistake. *See Doisey*, 138 N.C. App. at 626, 532 S.E.2d at 244 (evidence that the defendant placed a camcorder in a bathroom used by children and taped the activities in the bathroom was not properly admitted to show “design or scheme to take sexual advan-

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tage of children”); *State v. Hinson*, 102 N.C. App. 29, 36, 401 S.E.2d 371, 375 (1991) (evidence that the defendant possessed photographs depicting himself in women’s clothing, dildos, lubricants, vibrators and two pornographic books, was not properly admitted to show “proof of intent, preparation, plan, knowledge and absence of mistake,” in sexual offense case involving seven-year-old victim); *State v. Maxwell*, 96 N.C. App. 19, 24, 384 S.E.2d 553, 556 (1989) (evidence that the defendant frequently appeared nude in front of his children and had fondled himself in presence of daughter was not properly admitted to show “defendant’s plan or scheme to take advantage of his daughter”). Evidence of defendant’s mere possession of pornographic materials does not tend “to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” N.C. R. Evid. 401. The *only* evidence that defendant attempted to expose A.R. to pornographic materials was A.R.’s testimony that defendant once asked her to watch a video but would not tell her what the video was about. A.R. then speculated that she *thought* the video was a pornographic movie. However, the trial court allowed defendant’s motion to strike A.R.’s speculation. There was no evidence presented that defendant showed A.R. pornographic materials at the time of the alleged crimes or that the two of them had ever viewed pornographic materials together. Without more, A.R.’s mere speculation that defendant had attempted to get her to watch what she *thought* was a pornographic movie, is not enough to make the evidence of defendant’s possession of pornographic materials relevant to the crimes with which he was charged. *But see Rael*, 321 N.C. at 534, 364 S.E.2d at 129 (evidence of pornographic videos and magazines seized from the defendant’s house properly admitted to corroborate the victim’s testimony that the defendant had shown him such material at the time of the alleged crimes); *State v. Williams*, 318 N.C. 624, 632, 350 S.E.2d 353, 358 (1986) (evidence that the defendant had taken his daughter, the victim, to an x-rated movie and told her to watch the scenes depicting graphic sexual acts properly admitted to prove the defendant’s “specific sexual intent, preparation and plan with regard to his daughter”).

We agree with defendant’s contention that the only purpose of such evidence was to impermissibly inject defendant’s character into the case to raise the question of whether defendant acted in conformity with his character at the times in question. As a rule, substantive evidence of a defendant’s past misconduct is generally excluded when its only logical relevancy is to suggest the defendant’s propen-

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sity or predisposition to commit the type of offense for which he is charged. *State v. Shane*, 304 N.C. 643, 653-54, 285 S.E.2d 813, 820 (1982); *Maxwell*, 96 N.C. App. at 25, 384 S.E.2d at 557. We hold that evidence of defendant's possession of pornographic materials, without any evidence that defendant had viewed the pornographic materials with the victim, or any evidence that defendant had asked the victim to look at pornographic materials other than the victim's mere speculation, was not relevant to proving defendant committed the alleged offenses in the instant case and should not have been admitted by the trial court.

We further disagree with the State's contention that the evidence was admissible to corroborate the *voir dire* testimony of Jennifer Marquis that she and defendant had once looked at a pornographic magazine together. This testimony was never presented to the jury and thus cannot be the basis for admission of otherwise irrelevant testimony. Finally, we disagree with the State's contention that defendant waived any objection to the admission of evidence concerning his possession of pornographic materials by testifying on cross-examination as to such possession. The record shows that defense counsel consistently objected to questions concerning defendant's possession of pornographic materials throughout the trial. When the State asked defendant on cross-examination whether he kept pornographic magazines in the house, defense counsel again objected. The trial court overruled defense counsel's objection and defendant answered the question. Defendant then testified to his possession of both pornographic magazines and videotapes. Having timely objected when the State began its line of questioning concerning defendant's possession of pornographic materials, defendant was not required to enter another objection. Accordingly, defendant did not waive objection to the admission of this evidence.

However, we agree with the State that the trial court's admission of evidence of defendant's possession of pornographic material does not rise to the level of prejudicial error under N.C. Gen. Stat. § 15A-1443. The State presented A.R.'s testimony that defendant came into her room in February 1999, placed his hand up her shirt, and rubbed her breast. A.R. further testified that on 1 April 1999, defendant inserted his finger in her vagina. A.R.'s mother testified that when she came home on the night of 1 April 1999 she noticed that A.R. had been crying and that something was wrong. A.R.'s mother also testified that A.R.'s statements to her concerning what defendant had done on April 1 were consistent with A.R.'s testimony at trial.

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Michelle Zimmerman also testified that A.R.'s statements to her concerning the alleged sexual abuse were consistent with A.R.'s testimony at trial. Zimmerman also provided expert testimony that, following the alleged instances of sexual abuse, A.R. suffered from post-traumatic stress disorder, which Zimmerman testified can be caused by sexual assault. Finally, the State presented evidence that defendant had made sexually graphic and suggestive comments about A.R. to two of his co-workers. In light of this evidence, we hold that defendant has not shown a reasonable possibility that, had the trial court not admitted evidence of his possession of pornographic videos and magazines, a different result would have been reached at the trial. See N.C.G.S. § 15A-1443. Admission of the evidence, therefore, was not prejudicial error entitling defendant to a new trial.

[2] Defendant next contends that the trial court erred in not allowing testimony from A.R.'s mother that A.R. had watched the movie *Crush*. Defendant argues that testimony about the movie *Crush* would have corroborated defendant's theory of defense—that A.R. had fabricated the allegations against him in order to further her own interests.

On cross-examination, defense counsel asked Denise Joiner if A.R. had watched *Crush* a day or two before the alleged April 1 incident. The State objected. The trial court removed the jury from the courtroom and conducted a *voir dire* hearing. Denise testified that she and A.R. had watched the movie together, that A.R. had seen the movie more than once, but that she wasn't sure about the time frame between the last time A.R. watched *Crush* and the alleged April 1 incident. Denise also testified about the plot of the movie as follows:

It's a girl who has a crush on this man that moved into their guesthouse or whatever, she had a crush on him and she wanted him to pay her attention and he didn't. I mean, he did pay her attention but not to the—the magnitude that she wanted and she did ugly things to people that were in his life, his girlfriend and things like that. And initially she said that he had raped her when he had not.

After hearing Denise's testimony, the trial court sustained the State's objection to the admission of any evidence concerning the fact that A.R. had watched the movie. The record does not state the basis of the trial court's decision to sustain the State's objection.

Defendant contends that evidence that A.R. had watched the movie *Crush* was relevant to corroborate other evidence tending to

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show that A.R. was disgruntled over her mother's marriage to defendant, was unhappy about moving to North Carolina, and wanted to return to Virginia. We disagree.

The testimony before the trial court concerning the movie *Crush* only showed that A.R. had watched it on more than one occasion and that the plot involved a girl who made a false rape accusation against an older man who would not pay enough attention to her. There was no testimony tending to show that the details of the movie's plot were similar to the facts in the instant case. In fact, the two situations appear to be dissimilar, in that here A.R. was allegedly sexually abused by her stepfather, to whom there is no evidence that she was in any way attracted, while in the movie the young girl was attracted to the older man and was upset that the man would not pay enough attention to her. In addition, there was no evidence presented that A.R. had discussed the movie with her mother, or others, or had in any way indicated that the movie made her consider making an accusation against defendant in order to further her own interests. Accordingly, we agree with the State that evidence concerning A.R.'s viewing of *Crush* was not relevant and was properly excluded.

[3] Defendant next contends that the trial court erred in not allowing testimony by A.R.'s former neighbor that A.R. had falsely accused him of an improper touching four years prior to defendant's alleged acts of sexual abuse. Defendant maintains that the neighbor's testimony was admissible to show A.R.'s knowledge of how a young girl could raise accusations against a man with impunity and her intent and plan to make such accusations against defendant.

On cross-examination, defense counsel attempted to ask A.R. about her earlier accusation of improper touching against the neighbor. The State objected and the jury was removed from the courtroom. Defense counsel explained that he intended to question A.R. about the accusation and that he also intended to call the neighbor to the stand to deny that the alleged incident took place. The trial court conducted a *voir dire* hearing in which A.R. testified that the neighbor touched her on the abdomen, kissed her on the cheek, and told her how pretty she was. The alleged incident occurred when A.R. was nine years old. Following arguments of counsel, the trial court first ruled under Rule 412 of the North Carolina Rules of Evidence that it would not allow the testimony of the neighbor, but that it would allow defendant to question A.R. about the accusation. Before bringing the jury back in, the trial court reconsidered the issue and ultimately concluded under Rule 403 of the North Carolina Rules of Evidence that

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he would not allow defendant to question A.R. about the prior accusation because of the likelihood that it would confuse the jury.

Later in the trial, during the direct examination of defense witness Serena Sellers, defendant's sister, the trial court excluded her testimony concerning A.R.'s previous "allegation against [the] neighbor for some touching that proved to be false." However, on redirect examination, Serena Sellers testified without objection that Denise Joiner, A.R.'s mother, told her that A.R.'s previous allegation against the neighbor was a "false report." Serena Sellers then testified at length about the issue on redirect and recross.

At the close of defendant's case, apparently as a result of the testimony of Serena Sellers, the trial court informed the jury that it had reconsidered its earlier ruling and would now allow defendant to question A.R. concerning the previous accusation against the neighbor. A.R. was then questioned by both defense counsel and the State concerning the previous accusation. Following A.R.'s testimony, defendant did not ask the trial court to further reconsider its earlier ruling that the neighbor not be allowed to testify. Having failed to offer the testimony of the neighbor, or otherwise request that the trial court allow the neighbor to testify at that time, defendant waived his right to argue on appeal that the trial court erred in excluding the neighbor's testimony.

[4] Defendant next contends that the trial court erred in allowing the testimony of Jennifer Marquis concerning defendant's previous sexual activity with her when she was fifteen years old.

On *voir dire*, Marquis testified that she had two sexual encounters with defendant while she was babysitting for him. One night, after the two of them consumed mixed drinks and smoked marijuana together, defendant started trying to fool around with Marquis. Marquis testified that she told defendant she was not interested. Nonetheless, defendant pulled Marquis' pants off and performed oral sex on her. Marquis testified that she told defendant she did not want him to do so but that she didn't fight him off. The next morning, Marquis was lying on defendant's bed waiting for him to take a shower so he could take her home. When defendant got out of the shower, he lay down beside Marquis and tried to start "messaging around." Marquis again testified that she told defendant she was not interested. Defendant pulled down her pants and had sexual intercourse with her. Marquis again testified that the sexual encounter was not consensual but that she did not attempt to fight defendant.

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Following Marquis' testimony on *voir dire*, the trial court decided to allow Marquis' testimony under Rule 404(b). The trial court concluded that the evidence was relevant to show absence of mistake and a common plan or scheme, specifically that defendant took advantage of young girls in situations where he had parental or adult responsibility for them. The evidence was also admitted to show defendant's unnatural attraction to young girls. Following Marquis' testimony to the jury, the trial court gave a proper limiting instruction that the evidence was only to be considered for the limited purpose of showing an absence of mistake and defendant's plan, scheme, or design.

The courts of this State have been markedly liberal in admitting evidence of prior sexual misconduct of a defendant for the purposes cited in Rule 404(b). See *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *vacated on other grounds by Artis v. North Carolina*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990); *State v. Frazier*, 319 N.C. 388, 390, 354 S.E.2d 475, 477 (1987). The use of evidence permitted under Rule 404(b) is guided by two constraints: similarity and temporal proximity. *Artis*, 325 N.C. at 299, 384 S.E.2d at 481. When the features of the earlier act are similar to the offenses with which the defendant is currently charged and the stretch of time between the instances is not too remote, such evidence has probative value. *Id.* The similarity between the prior conduct and the crime with which the defendant is charged "need not rise to the level of the unique and bizarre, but must tend to support a reasonable inference that the same person committed both the earlier and the later acts." *State v. Gary*, 348 N.C. 510, 521, 501 S.E.2d 57, 65 (1998).

In the instant case, defendant was charged with sexual misconduct with a twelve year old which consisted of rubbing her breast and digitally penetrating her vagina. Marquis testified that, when she was fifteen years old, defendant had sexual intercourse and performed oral sex on her without her consent. While this Court appreciates the age difference between Ms. Marquis and the victim in the instant case, and the fact that Ms. Marquis never reported the alleged sexual encounters between her and defendant to the authorities until the investigation in the instant case, we conclude that those distinctions go to the weight of Ms. Marquis' testimony and not to its admissibility. We conclude that defendant's conduct with the two women was sufficiently similar and proximate in time to support its admission under Rule 404(b).

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We write further to voice our disapproval of the trial court's refusal to let defense counsel question Ms. Marquis on *voir dire*, as well as the trial court's failure to show on the record that it performed the balancing test set forth under Rule 403. However, we do not feel that either of these mistakes rises to the level of error. Assuming, *arguendo*, that these mistakes were error, we conclude that they do not rise to the level of prejudicial error under N.C. Gen. Stat. § 15A-1443 in light of the other convincing evidence presented at trial.

[5] In defendant's final contention, he argues that the trial court abused its discretion and violated his constitutional right to be present at trial in refusing to grant a continuance or mistrial due to defendant's illness. We disagree.

On one of the days of trial, defendant twice ran out of the courtroom to go to the restroom. Defense counsel subsequently informed the trial court that defendant was nauseated and moved that the trial be continued until the next day. The trial court agreed to let defendant see a doctor but indicated that he would not continue the trial if the only problem was defendant's nervous stomach. The trial court allowed the examination of the witness on the stand to be completed and recessed court to allow defendant to see a doctor.

Defendant was examined by a doctor during the recess. The doctor wrote the following note, which was presented to the trial court:

In re: Franklin Smith [Defendant]

Mr. Smith was found to have a highly elevated blood pressure. He needs further evaluation by his own physician. In addition, he was treated for the nausea and vomiting. He should not continue with his court today.

The note was signed, Walter Holton, M.D. Defense counsel informed the trial court that the doctor had treated defendant's nausea with Phenergan 25, which defense counsel contended was a sedative. The trial court was also informed that defendant's blood pressure was 152 over 118 and approximately fifteen minutes later was 145 over 105.

The State then called to the stand the sheriff's deputy who had escorted defendant to the doctor. The deputy testified that defendant had predicted that his blood pressure would be 160 over 108 and that defendant told the nurse that he had suffered from a blood pressure

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problem for quite awhile. Following arguments of counsel, the trial court made the following ruling:

The Court has observed the defendant, has observed his assistance to you this morning and in the last five minutes. And also would make the personal observation that he looks no different than he has looked the whole week. Been red-faced the whole week. Also, the Court will find that he knew about his high blood pressure, that he has been medicated for the nausea and that he is able to assist you in the defense of the matter and the motion to continue is denied.

Following this ruling, counsel for defendant called his remaining witnesses and then put defendant on the stand himself to testify. Prior to defendant taking the stand, defense counsel did not renew his motion to continue. At the beginning of his testimony, defendant stated that he felt sleepy and was having trouble putting words together. Later in his testimony, defendant stated he was having trouble paying attention and attributed it to the drugs the doctor had given him. However, at no time during defendant's testimony did defense counsel renew the motion to continue.

At the close of the evidence, defendant moved for a mistrial based on the trial court's refusal to continue the trial the previous day due to defendant's illness. The trial court recited the events of the previous day and ruled as follows:

The Court was addressed—or notified that the defendant felt bad yesterday morning, and had been throwing up but no request was made of the Court to stop the proceedings at that point. And the defendant did become physically ill and the Court allowed him to be excused and stopped the proceedings twice, I think, while he did that.

At about 11 o'clock the Court was requested to stop the proceedings and allow the defendant to be examined, which the Court did. The defendant was examined. The examination revealed that the defendant was aware of his high blood pressure, symptoms which he had had for some time and neglected to treat, knew about before this proceeding. Defendant was—and testified that the proceedings had made him physically ill and Court will take judicial notice that that is a possibility for any defendant faced with what this defendant is facing and the possibilities of that. And Court has observed the defendant throughout the pro-

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ceedings, his physical appearance has not changed since Monday. And he has shown—other than getting physically ill yesterday morning prior to being treated, he has shown the same physical traits and conduct that he's shown from the very beginning of the proceedings on Tuesday.

Court observed the defendant throughout his testimony and observed that he answered the questions, understood the questions, had detailed answers to the questions, supplied testimony that was responsive to the questions and gave examples, dates in response to the questions, and cannot find that the defendant was unable to proceed with his case or to assist in his defense and denies the motion to mis-try the action.

A motion for a continuance, and here the motion for a mistrial after no continuance was granted, "is ordinarily addressed to the sound discretion of the trial court and its ruling is not subject to review absent abuse of discretion." *State v. Thomas*, 294 N.C. 105, 111, 240 S.E.2d 426, 431 (1978). However, where the motion is based on a constitutional right, "the question presented is one of law and not discretion, and the ruling of the trial court is reviewable on appeal." *Id.* "Whether a defendant bases his appeal upon an abuse of judicial discretion or a denial of his constitutional rights, he must show both that there was error in the denial of the motion and that he was prejudiced thereby before he will be granted a new trial." *Id.* at 111, 240 S.E.2d at 431-32.

In *State v. Rhodes*, 202 N.C. 101, 161 S.E. 722 (1932), the defendant moved for a continuance on 5 March 1931 on the ground that he was not physically able to go to trial, and produced two certificates, each signed by a reputable physician, indicating the defendant's "highly nervous state" and the probability of a nervous collapse or breakdown. The motion was denied and the case was set for trial the following Monday, 9 March 1931. The case was not called at that time but the trial court requested that a physician examine the defendant. The physician found no organic disease, attributed the defendant's condition to large doses of hypnotic drugs, and expressed the opinion that under certain conditions the defendant would soon be able to undergo the trial. The case was finally called on 11 March 1931 and the defendant's motion to continue was again overruled. On appeal, the Supreme Court held that the trial court's denial of the defendant's motion for a continuance was not an abuse of discretion, because the trial court "made a careful and patient investigation of the circumstances pending the several motions of the de-

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fendant and refused a continuance after sufficient opportunity for reflection.” *Id.* at 103, 161 S.E. at 723.

In *State v. Ipock*, 242 N.C. 119, 86 S.E.2d 798 (1955), the defendant moved for a continuance on the ground that he was physically unable to attend court. In support of the motion, the defendant presented a doctor’s note advising home care. The Supreme Court held that, since the doctor’s note did not say that the defendant was unable to stand trial or that a trial would endanger his health, the trial court did not abuse its discretion in denying the defendant’s motion to continue.

In *State v. Bacon*, 326 N.C. 404, 390 S.E.2d 327 (1990), the defendant became ill during jury selection. A doctor was summoned who examined the defendant and reported that the defendant’s blood pressure was fine, his pulse “was a little high which is understandable,” and “I think he’s basically fit to undergo the trial.” *Id.* at 415, 390 S.E.2d at 333. Jury selection resumed. Defendant objected and was allowed to state how he felt on the record. The defendant indicated that he had a headache and an upset stomach and was having difficulty paying attention to what the jurors were saying, but that his condition had not affected his ability to understand the charges against him. The trial court noted that the defendant appeared well and refused to grant a continuance. The trial court requested that defense counsel let it know if the defendant was unable to communicate with him. Defense counsel never so informed the trial court. The Supreme Court stated that the defendant failed “to demonstrate even one occasion where he was unable to comprehend the proceedings or to communicate his opinions of the jurors to his counsel as a result of his alleged illness.” *Id.* at 416, 390 S.E.2d at 334. Accordingly, the Supreme Court found no abuse of discretion by the trial court.

In the case *sub judice*, the trial court allowed defendant to be examined by a doctor who indicated that defendant “should not continue with his court today,” due to his elevated blood pressure and his treatment for nausea and vomiting. The doctor’s note did not state that defendant was physically unable to stand trial or that the trial would endanger defendant’s health. See *Ipock*, 242 N.C. at 120, 86 S.E.2d at 800. The record shows that the trial court considered the doctor’s opinion, but then reached its own conclusion based on its personal observation that defendant was able to assist in his defense. Defendant was then called to the stand and testified. The trial court observed defendant throughout his testimony and concluded that defendant understood the questions, gave detailed answers to the

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questions, and was able to assist in his defense. Having reviewed defendant's testimony, we agree with the trial court that defendant was responsive to counsel's questions and provided clear testimony. Accordingly, we conclude that the trial court did not err in denying defendant's motion for a continuance and subsequent motion for a mistrial.

In conclusion, we hold that the trial court erred in admitting evidence of defendant's possession of pornographic materials but this error was not prejudicial under N.C. Gen. Stat. § 15A-1443. Defendant's remaining assignments of error are overruled.

No prejudicial error.

Judges MARTIN and TIMMONS-GOODSON concur.

NEAL MILLER, PLAINTIFF v. B.H.B. ENTERPRISES, INC., D/B/A VINNIE'S SARDINE
GRILLE & RAW BAR, DEFENDANT

No. COA01-1282

(Filed 3 September 2002)

1. Evidence— lay opinion—intoxication of assailant

The trial court did not err in a negligence action that originated in a beating outside a restaurant by admitting lay opinion testimony that the off-duty bouncer who punched and kicked plaintiff was intoxicated. The testimony was based on first-hand knowledge from personal observation and was relevant and helpful to the jury. N.C.G.S. § 8C-1, Rule 701.

2. Damages and Remedies— punitive damages—sufficiency of evidence—bouncers not halting beating

The trial court did not err in an action originating in a beating outside a restaurant by denying the restaurant owner's motion for a directed verdict on punitive damages based on allegedly insufficient evidence that defendant's employees acted willfully and wantonly. There was testimony that defendant's manager and two bouncers witnessed the attack on plaintiff and were "very close" as plaintiff was punched, then

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kicked as he lay on the ground; that the bouncers' duties included preventing fighting; and that the manager had the authority to tell the bouncers to intervene.

3. Damages and Remedies— punitive damages—beating outside restaurant—corporate complicity—manager and bouncers standing by

The plaintiff in a negligence action originating in a beating outside a restaurant presented evidence sufficient to support a punitive damages claim against a corporate defendant where there was ample evidence that Bennet was a manager for defendant and stood by with two bouncers while plaintiff was repeatedly kicked as he lay helpless on the ground.

4. Negligence— beating outside restaurant—failure of manager and bouncers to intervene

The trial court properly denied defendant restaurant owner's motion for a directed verdict on the issue of negligence in an action arising from a beating outside the restaurant where plaintiff was intoxicated and falling down; an off-duty bouncer was intoxicated and had been making fun of plaintiff; defendant's manager and two bouncers led plaintiff out the front door as a result of plaintiff's conduct toward a female bartender; plaintiff fell and was left in a perilous position; the off-duty bouncer came outside and attacked plaintiff while the manager and two bouncers watched; and neither the manager nor the bouncers offered assistance to plaintiff or took any steps to stop the attack.

5. Negligence— intervening cause—attack outside restaurant

Defendant restaurant owner was not relieved of negligence by an intervening cause where defendant's manager and two bouncers escorted plaintiff from the restaurant and an off-duty bouncer punched and kicked plaintiff. Defendant's manager placed plaintiff in a helpless state by removing him from the restaurant and leaving him outside with knowledge that the off-duty bouncer had been drinking and was angry at plaintiff, and did nothing when the off-duty bouncer began beating plaintiff.

6. Negligence— instructions—bar fight—responsibility of restaurant owners

The trial court did not err in its instructions in a negligence action arising from a beating by an off-duty bouncer.

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7. Pleadings— amendments—negligence—last clear chance

The trial court did not abuse its discretion by allowing plaintiff to amend his pleadings to conform to evidence of last clear chance in an action arising from a beating outside a restaurant where there was sufficient evidence to support the doctrine and defendant restaurant owner did not argue that it was prejudiced by the amendment.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from judgment entered 19 March 2001 by Judge Raymond A. Warren in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 June 2002.

The Law Offices of William K. Goldfarb, by William K. Goldfarb, for plaintiff-appellee.

The McIntosh Law Firm, P.C., by Christopher G. Chagaris, for defendant-appellant.

MARTIN, Judge.

Plaintiff, Neal Miller, brought this action seeking compensatory and punitive damages from defendant, B.H.B. Enterprises, Inc., d/b/a Vinnie's Sardine Grille & Raw Bar, for injuries sustained when plaintiff was allegedly assaulted on defendant's premises. Plaintiff alleged, *inter alia*, that defendant was negligent in failing to maintain its premises in a reasonably safe condition, in placing him in a dangerous situation, and in failing to intervene when he was assaulted by a third person. In its answer, defendant denied any negligence on its part and alleged, as defenses, plaintiff's contributory negligence and the intervening criminal act of a third party.

Summarized only to the extent necessary to an understanding of the issues raised on appeal, the evidence at trial tended to show that on the evening of 18 April 1998, plaintiff, while a patron at defendant's restaurant, consumed a quantity of alcohol and became intoxicated. Jeff Beers ("Beers") was also a patron at the restaurant that evening. Beers was employed by defendant as a bouncer, but was not on duty on the evening in question. Beers also consumed alcohol and became intoxicated. During the course of the evening, plaintiff apparently became disruptive and attracted the attention of Beers. Wendy Sturges, another patron at the restaurant who didn't know plaintiff or Beers, testified that at approximately 2:00 a.m. on 19 April, she saw

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plaintiff fall down at the bar and then saw two of defendant's on-duty bouncers take plaintiff by his arms and lead him to the entrance. As they approached the door Ms. Sturges testified that she saw plaintiff fall again, as though he had been tripped. Plaintiff staggered to his feet and went outside, accompanied by the two bouncers and defendant's manager, Radford Bennett. At that point, Ms. Sturges testified that Beers jumped over a rope at the building's entrance and began beating plaintiff with his fists. Plaintiff fell to the ground and Beers began kicking him. Neither Bennett nor either of defendant's bouncers intervened to stop the attack. Plaintiff was rendered briefly unconscious. He was transported by ambulance to the hospital, where he received approximately 15 stitches to his head and face. Plaintiff, who testified that he had no recollection of the events that occurred outside of the restaurant, sustained permanent scars to his face.

Radford Bennett testified that he was the manager of defendant's restaurant and that he hired the restaurant's employees. He instructed the two bouncers to remove plaintiff from the restaurant because it had been reported to him by a female bartender that plaintiff was grabbing women and "horsing around." He knew that the female bartender had a dating relationship with Beers. He followed the bouncers as they led plaintiff to the door. He saw Beers come out the door and he and the two bouncers watched as Beers beat and kicked plaintiff. Bennett testified that Beers had worked at the restaurant the previous night as a bouncer and was scheduled to work on the evening in question, but that when he came to work, he told Bennett that he wanted to drink there that night rather than work.

The following issues were submitted to, and answered by, the jury:

- 1) Was the Plaintiff injured by the negligence of the defendant?

ANSWER: Yes

- 2) Did the plaintiff, by his own negligence, contribute to his injury?

ANSWER: Yes

- 3) Did the defendant have the last clear chance to avoid the plaintiff's injury?

ANSWER: Yes

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- 4) What amount is the plaintiff entitled to recover for personal injury?

ANSWER: \$5,320.00

- 5) Was the plaintiff injured by the willful or wanton conduct of the defendant?

ANSWER: Yes

- 6) What amount of punitive damages, if any, does the jury in its discretion award to the plaintiff?

ANSWER: \$15,760.00

Defendant appeals from the judgment entered upon the verdict.

Defendant's counsel has ignored the requirement of N.C.R. App. P. 28(b)(6) that, in an appellant's brief, "[i]mmediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal." The Rules of Appellate Procedure are designed to expedite appellate review and defendant's failure to observe the requirements of the Rules subjects its appeal to dismissal. *See Bowen v. N.C. Dept. of Health & Human Services*, 135 N.C. App. 122, 519 S.E.2d 60 (1999); N.C.R. App. P. 25(b), 34(b)(1). Nevertheless, exercising the discretion granted us by N.C.R. App. P. 2, we will consider defendant's arguments.

I.

[1] Defendant assigns error to the admission of testimony by Wendy Sturges that, in her opinion, Beers was intoxicated. Defendant argues plaintiff failed to establish any basis for her opinion.

G.S. § 8C-1, Rule 701 provides that a non-expert may testify and provide opinions or inferences "which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2001). "If based on first-hand knowledge and helpful to the jury, this rule permits lay opinions regarding a [person's] . . . intoxication . . ." *State v. Dukes*, 110 N.C. App. 695, 706, 431 S.E.2d 209, 215-16 (1993) (citing *State v. Adkerson*, 90 N.C. App. 333, 368 S.E.2d 434 (1988)).

Sturges testified that she was present at defendant's restaurant from 11:30 p.m. until 2:00 a.m.; that she observed Beers during the

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entire time she was there; that he was talking loudly, and acting boisterously and obnoxiously; and that, in her opinion, he was intoxicated. Her testimony was clearly based upon first-hand knowledge from personal observation. The testimony was also relevant and helpful to the jury since the issue of Beers' intoxication was an important issue of fact in light of plaintiff's contention that defendant continued to serve Beers alcohol after he had become intoxicated, and that defendant's manager then stood by and watched as Beers beat and kicked plaintiff after the manager had ejected plaintiff from the restaurant. This assignment of error is overruled.

II.

By separate assignments of error, defendant contends the trial court erred by denying its motions for directed verdict on the issues of punitive damages, negligence, and intervening criminal act of a third party. We will consider the arguments in the order in which they are presented in defendant's brief.

A motion for directed verdict "tests the legal sufficiency of the evidence, considered in the light most favorable to the nonmovant, to take the case to the jury." *Northern Nat'l Life Ins. v. Miller Machine Co.*, 311 N.C. 62, 69, 316 S.E.2d 256, 261 (1984). If the evidence is insufficient to support a verdict in the nonmovant's favor, the motion should be granted. *Stanfield v. Tilghman*, 342 N.C. 389, 464 S.E.2d 294 (1995). If the trial court finds there is more than a scintilla of evidence supporting plaintiff's claim, the motion for directed verdict should be denied. *Hutelmeyer v. Cox*, 133 N.C. App. 364, 514 S.E.2d 554, *disc. review denied*, 351 N.C. 104, 541 S.E.2d 146 (1999). Only in exceptional cases is it appropriate to render a directed verdict against a plaintiff in a negligence claim. *Taylor v. Walker*, 320 N.C. 729, 360 S.E.2d 796 (1987). The sufficiency of the evidence to withstand a motion for directed verdict or judgment notwithstanding the verdict presents an issue of law. *In re Will of Buck*, 350 N.C. 621, 516 S.E.2d 858 (1999).

A. Punitive Damages

[2] Defendant contends the trial court erred in failing to grant its motion for directed verdict as to punitive damages on two grounds: (1) there was insufficient evidence that defendant's employees acted willfully and wantonly because there was no evidence that the employees could have prevented plaintiff's injuries; and (2) there was no evidence that an officer, manager, or director of de-

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fendant participated in or condoned Beers' actions. We address each argument in turn.

G.S. § 1D-15 provides:

(a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:

(1) Fraud.

(2) Malice.

(3) Willful or wanton conduct.

(b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.

N.C. Gen. Stat. § 1D-15 (2002).

Defendant argues that plaintiff's position that its employees acted willfully and wantonly by failing to intercede must fail because there is no evidence that defendant's employees could have prevented plaintiff's injuries. However, in order to prove that conduct is willful or wanton within the meaning of G.S. § 1D-15, plaintiff need only show that defendant acted with "conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." N.C. Gen. Stat. § 1D-5(7).

Here, plaintiff presented Ms. Sturges' testimony that Bennett and two of defendant's bouncers who were working that evening witnessed the "brutal attack" on plaintiff. Ms. Sturges testified that Bennett and the bouncers were standing "right there" and were "very close" as Beers began hitting plaintiff, who then fell to the ground, and repeatedly kicked plaintiff. Ms. Sturges testified that despite defendant's employees having more than one opportunity to intervene and protect plaintiff, who was "not moving" and "looked like he was dead," from Beers' blows, Bennett and the bouncers simply watched.

Ms. Sturges' testimony was corroborated by Bennett's, who conceded that he and the two bouncers who escorted plaintiff from the bar witnessed the beating and were standing "right there" when Beers came out and began hitting plaintiff, who then fell to the ground.

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Bennett testified that plaintiff was not able to protect himself after the first punch was thrown by Beers, and that Beers continued to kick plaintiff “[m]ore than once” while plaintiff was laying on the ground unable to help himself. Bennett admitted that neither he nor the bouncers did anything to help plaintiff, reasoning only that there was not enough time to do so. However, even under Bennett’s estimation that one-half of a minute passed from the time Beers first punched plaintiff until he was finished with the beating, such evidence, considered under the standard for a directed verdict, is sufficient to support the trial court’s denial of defendant’s motion, particularly given the testimony that Bennett and the bouncers were standing “right there” and “very close” to plaintiff for the half-minute that he was being beaten.

Moreover, Bennett, as the bouncers’ superior, had the authority to instruct them to intervene on plaintiff’s behalf. Indeed, Bennett acknowledged that defendant employs bouncers to assist in dealing with people who “can’t handle their alcohol,” because some patrons “get drunk and like to fight,” and because bouncers can “separate” drunk and belligerent patrons from others. Bennett’s testimony establishes that part of the bouncers’ duties as employees of defendant was to prevent fighting. Moreover, Bennett testified that the bouncers who witnessed plaintiff being beaten were “big dudes” who were so strong that plaintiff would not have been able to struggle while being escorted from the bar even if he had wanted to. Taken in the light most favorable to plaintiff, the evidence sufficiently established that defendant’s employees acted with “conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm.” N.C. Gen. Stat. § 1D-5(7).

[3] We also reject defendant’s argument that plaintiff failed to present sufficient evidence that an officer, director, or manager of defendant participated in or condoned the attack on plaintiff. Under G.S. § 1D-15(c), punitive damages may not be assessed against a corporation unless “the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages.” N.C. Gen. Stat. § 1D-15(c). As the legislature has not seen fit to define the word “manager” in this context, we must accord that word its plain meaning. *See Grant Const. Co. v. McRae*, 146 N.C. App. 370, 376, 553 S.E.2d 89, 93 (2001) (if word not defined in statute, courts must accord word plain meaning and refrain from judicial construction). A “manager” is one

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who “conducts, directs, or supervises something.” *Webster’s Third New International Dictionary* 1372 (1968). The record contains ample evidence that Bennett was a “manager” of defendant.

Bennett testified in his deposition that he was hired by defendant for the purpose of opening the restaurant at issue in Matthews, North Carolina. He stated that he was the one who “actually went in and opened up that whole establishment.” He further stated that he worked “hand-in-hand” with Britton McCorkle, defendant’s owner, to open up the restaurant in Matthews. McCorkle testified that he is one of three shareholders of defendant, but that he is the “operating partner” of the business. Bennett testified that he worked “directly under” McCorkle. Bennett stated that once he and McCorkle opened the restaurant, he assumed control of its daily operations, including all hiring and managing of the employees necessary to run the restaurant, all training (including the training of all managers and other “certified trainers” at the restaurant), and all of the ordering necessary to run the restaurant, including all food and service ware. Bennett had his own assistant to help him with running the restaurant, who performed such duties as conducting all first interviews with potential hires, with Bennett interviewing only those who had successful first interviews. Clearly, the evidence is sufficient to establish that Bennett handled, controlled, and directed defendant’s operation of the restaurant.

Moreover, the evidence, taken in the light most favorable to plaintiff, was sufficient to show that Bennett condoned the attack on plaintiff. The plain meaning of “condone” is to “forgive or overlook,” *The Oxford American Dictionary* 197 (1999), or “permit the continuance of.” *Webster’s Third New International Dictionary* 473 (1968). As set forth above, the evidence established that Bennett and two bouncers stood “right there” while plaintiff, who was rendered helpless after the first blow, was repeatedly kicked, and that Bennett failed to intervene himself or direct his employees to intervene, despite acknowledging that it was the bouncers’ job to prevent fights involving drunk patrons. This assignment of error is overruled.

B. Negligence

[4] In support of its contention that it was entitled to a directed verdict on the issue of negligence, defendant argues the evidence was not sufficient to show any breach of duty on its part in failing to protect plaintiff from the assault by a third party, Beers, or that

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any measures which it could have taken would have prevented plaintiff's injury because the attack by Beers was not foreseeable. We disagree.

While a possessor of land is not ordinarily liable for injuries to lawful visitors to the premises which are caused by the intentional criminal acts of third persons, "a proprietor of a public business establishment has a duty to exercise *reasonable or ordinary care* to protect his patrons from intentional injuries by third persons, *if he has reason to know that such acts are likely to occur.*" *Murrow v. Daniels*, 321 N.C. 494, 500-01, 364 S.E.2d 392, 397 (1988) (emphasis supplied) (citing *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638-39, 281 S.E.2d 36, 38 (1981) *citing with approval* Restatement (Second) of Torts § 344 and comment f (1965) (other citation omitted). Therefore, whether a proprietor has a duty to safeguard his invitees from injuries caused by the criminal acts of third persons is a question of foreseeability. *Id.* "Liability for injuries may arise from failure of the proprietor to exercise reasonable care to discover that such acts by third persons are occurring, or are likely to occur, coupled with failure to provide reasonable means to protect his patrons from harm or give a warning adequate to enable patrons to avoid harm." *Id.* (citations omitted). Further, according to this Court, "evidence pertaining to the foreseeability of criminal attack shall not be limited to prior criminal acts occurring on the premises." *Sawyer v. Carter*, 71 N.C. App. 556, 561, 322 S.E.2d 813, 817 (1984), *disc. review denied*, 313 N.C. 509, 329 S.E.2d 393 (1985).

At trial, defendant attempted to characterize the attack upon plaintiff by Beers as a fight between two individuals. However, considered in the light most favorable to plaintiff, the evidence tended to show (1) plaintiff was intoxicated and falling down; (2) Jeff Beers, who was defendant's off-duty employee and known to defendant's manager and on-duty bouncers, was intoxicated and had been making fun of plaintiff; (3) as a result of plaintiff's conduct directed toward the female bartender, defendant's manager and two of the on-duty bouncers led plaintiff out the front door where plaintiff again fell; (4) plaintiff was left in a perilous position; (5) while the manager and two bouncers watched, Beers came outside and attacked plaintiff; and (6) neither the manager nor either of the bouncers offered any assistance to plaintiff or took any steps to stop the brutal attack. On this evidence, the jury could have reasonably found that it was foreseeable that Beers might assault and injure plaintiff if they left plaintiff outside the restaurant in a perilous position, or did not intervene to stop

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the beating. The trial court properly denied defendant's motion for a directed verdict on the issue of negligence.

C. Intervening Criminal Act of Third Party

[5] Defendant next contends that Beers' criminal activity was an intervening cause that relieved defendant from negligence by cutting off the proximate cause flowing from the acts of defendant's agents. We disagree.

With regard to the doctrine of superseding or intervening negligence, our Supreme Court has stated:

"An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote."

Hairston v. Alexander Tank & Equip. Co., 310 N.C. 227, 236, 311 S.E.2d 559, 566 (1984) (quoting *Harton v. Telephone Co.*, 141 N.C. 455, 462, 54 S.E. 299, 301-02 (1906)).

As explained above, defendant, through its manager, had a duty to exercise reasonable care to protect plaintiff from harm under the facts of this case. Defendant's manager placed plaintiff in a helpless state by removing him from the restaurant and leaving him outside with knowledge that Beers was angry at plaintiff's conduct with respect to the female bartender and that Beers, an off-duty bouncer at the restaurant, had been at the restaurant for several hours drinking alcohol. Once Beers began beating plaintiff, defendant's manager knew that physical harm was occurring and did nothing to interrupt, prevent, or intervene in the affray. Therefore, Beers' actions did not entirely supersede defendant's negligent conduct. This assignment of error is overruled.

III.

[6] Defendant next contends the trial court erred by deviating from the pattern jury instructions and submitting prejudicial instructions to the jury. Specifically, defendant claims that the trial court's instructions to the jury "were prejudicial, contained misstatements of the law and placed an undue and unreasonable legal burden upon the defendant." We disagree.

When the evidence is reviewed in the light most favorable to plaintiff, sufficient evidence exists to show that defendant's agents

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failed to exercise reasonable care to protect plaintiff from Beers. The jury could have found from the evidence that it was foreseeable that Beers would have attacked plaintiff, or that defendant's agents owed plaintiff a duty to rescue him after they had placed him in a helpless position. Defendant cites no authority or argument to support his proposition that the jury instructions were improper. We have reviewed the instructions, and discern no error. This assignment of error is overruled.

IV.

[7] Defendant finally argues the trial court erred by allowing plaintiff to amend his pleadings at the close of his evidence to include the defense of last clear chance where no evidence supported this assertion. Defendant argues that plaintiff "failed to present any evidence that he put himself in a position of peril or imminent harm."

There is substantial evidence that plaintiff was intoxicated, fell down at least three times, and had no recollection of the events that occurred outside the restaurant. Plaintiff moved to amend his pleadings to include the doctrine of last clear chance. Defendant objected. The trial court allowed the amendment to conform to the evidence presented at trial.

Rule 15(b) of the Rules of Civil Procedure provides in pertinent part that:

Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when . . . the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

N.C. Gen. Stat. § 1A-1, Rule 15(b) (2001). "Liberal amendment of pleadings is encouraged by the Rules of Civil Procedure in order that decisions be had on the merits and not avoided on the basis of mere technicalities." *Phillips v. Phillips*, 46 N.C. App. 558, 560-61, 265 S.E.2d 441, 443 (1980) (citing *Mangum v. Surles*, 281 N.C. 91, 187 S.E.2d 697 (1972)); see also *Mauney v. Morris*, 316 N.C. 67, 340 S.E.2d 397 (1986).

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The trial judge has broad discretion in ruling on motions to amend pleadings. *Auman v. Easter*, 36 N.C. App. 551, 244 S.E.2d 728, *disc. review denied*, 295 N.C. 548, 248 S.E.2d 725 (1978). "The objecting party has the burden of satisfying the trial court that he would be prejudiced by the granting or denial of a motion to amend. The exercise of the court's discretion is not reviewable absent a clear showing of abuse thereof." *Watson v. Watson*, 49 N.C. App. 58, 60-61, 270 S.E.2d 542, 544 (1980) (citations omitted). Defendant did not argue here or at trial that he was prejudiced by the trial court allowing amendment of the pleadings. We find that plaintiff produced sufficient evidence to support the doctrine of last clear chance. Defendant has failed to carry its burden of showing an abuse of discretion. This assignment of error is overruled.

The judgment of the trial court is affirmed.

Affirmed.

Judge THOMAS concurs.

Judge TYSON concurs in part and dissents in part.

TYSON, Judge, concurring in part and dissenting in part.

I concur with parts I, IIB, IIC, III, and IV of the majority's opinion. I respectfully dissent from part IIA for two reasons: (1) plaintiff presented no evidence that "the officers, directors, or managers" of B.H.B. Enterprises, Inc. participated in or condoned the battery committed against plaintiff or that (2) Radford Bennett, the manager of the restaurant, was an "officer, director, or manager" of B.H.B., Enterprises, Inc.

I. G.S. § 1D-15

The majority's opinion sets forth G.S. § 1D-15(a) and (b) in their entirety. However, that opinion fails to set out subsection (c) which provides as follows:

(c) Punitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another. Punitive damages may be awarded against a person only if that person participated in the conduct constituting the aggravating factor giving rise to the punitive damages, or if, in the case of a corporation, the officers, directors, or managers of the

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corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages.

N.C. Gen. Stat. § 1D-15(c) (2001) (emphasis supplied).

The language of G.S. § 1D-15(c) is explicit and contextual. The majority's opinion isolates the word "managers," removes it from its contextual setting, and then defines the word "managers" using Webster's Dictionary. This approach is inconsistent with established canons of statutory construction. The majority's opinion states that "courts must accord [a] word [its] plain meaning and refrain from judicial construction." This is a standard rule of construction, but not a complete statement of the rules.

"The words of a statute must be construed in accordance with their ordinary and common meaning *unless they have acquired a technical meaning or unless a definite meaning is apparent or indicated by the context of the words.*" *Raleigh Place Assoc. v. City of Raleigh, Bd. of Adjustment*, 95 N.C. App. 217, 219, 382 S.E.2d 441, 442 (1989) (citing *State v. Lee*, 277 N.C. 242, 176 S.E.2d 772 (1970) (emphasis supplied)). See also *Ace-Hi, Inc. v. Department of Transp.*, 70 N.C. App. 214, 218, 319 S.E.2d 294, 297 (1984) (citing *Lafayette Transp. Service, Inc. v. County of Robeson*, 283 N.C. 494, 196 S.E.2d 770 (1973)); *State v. Phipps*, 112 N.C. App. 626, 629, 436 S.E.2d 280, 281 (1993). "Words and phrases of a statute 'must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit.'" *Vogel v. Reed Supply Co.*, 277 N.C. 119, 131, 177 S.E.2d 273, 280 (1970) (quoting 7 Strong's N.C. Index 2d, Statutes § 5; *State v. Spencer*, 276 N.C. 535, 173 S.E.2d 765 (1970) (other citations omitted)). Where words have a known technical meaning, that meaning must be adopted in construing a statute. *Randall v. R.R.*, 104 N.C. 410, 413, 10 S.E. 691, 691 (1889). "A complimentary rule of construction provides that when technical terms or terms of art are used in a statute, they are presumed to be used with their technical meaning in mind, likewise absent legislative intent to the contrary." *Dare County Bd. of Educ. v. Sakaria*, 127 N.C. App. 585, 588, 492 S.E.2d 369, 371-72 (1997) (citing *Black v. Littlejohn*, 312 N.C. 626, 639, 325 S.E.2d 469, 478 (1985)).

"Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Norfolk and Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 129,

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113 L. Ed. 2d 95, 107 (1991). "The maxim *ejusdem generis* applies especially to the construction of legislative enactments. It is founded upon the obvious reason that if the legislative body had intended the general words to be used in their unrestricted sense the specific words would have been omitted." *Meyer v. Walls*, 347 N.C. 97, 106, 489 S.E.2d 880, 885 (1997) (quotation omitted).

Here, the word "managers" has (1) a limited range of meanings utilizing the principle of *ejusdem generis*, (2) a technical meaning, and (3) a meaning apparent and indicated within the context of G.S. § 1D-15(c). To define the word "managers" with one of its dictionary definitions broadens its scope of possible meanings beyond permissible boundaries as set forth in the statute.

The legislature placed the word "managers" directly after the words "officers" and "directors." The word "managers" should be understood as a reference to subjects akin to "officers" and "directors." A restaurant "manager" is not akin to an "officer" or "director" of a corporation. A restaurant manager oversees a physical location; a director or officer directs or supervises a corporation.

The word "managers" is also defined with a technical meaning in other portions of the North Carolina General Statutes. Corporations are owned by shareholders and managed by "directors" and "officers." See North Carolina Business Corporation Act in Chapter 55 of the North Carolina General Statutes. Limited liability companies are owned by "members" and managed by "managers." See North Carolina Limited Liability Company Act in Chapter 57C of the North Carolina General Statutes. N.C. Gen. Stat. § 57C-3-22 expressly defines the "Duties of managers." The term "managers," as technically defined in G.S. § 57C-3-22 does not resemble the dictionary definition that the majority ascribes to the word "managers." In this context, the word "managers" is synonymous with the words "directors" and "officers" in the business entity setting.

The meaning of the word "managers" is also apparent and indicated by the context in which it is used in G.S. 1D-15(c). Sentence number two of G.S. § 1D-15(c) must be read in the context of sentence one. The first sentence of G.S. § 1D-15(c) states that "Punitive damages shall not be awarded against a person solely on the basis of vicarious liability" N.C. Gen. Stat. § 1D-15(c). Restaurant managers are not "officers, directors or managers" of a corporation; they are employees of the corporation. The doctrine of *respondeat superior* provides that "the torts of an employee that occur in the course

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of employment are imputed to the employer.” David A. Logan & Wayne A. Logan, *North Carolina Torts*, § 10.30 at 233 (1996). The doctrine allows for vicarious liability.

Here, all of the corporate defendant’s liability is vicarious. Radford Bennett is an employee of the corporate defendant. B.H.B. Enterprises, Inc., defendant, is owned by Britton McCorkle (“McCorkle”). There is no evidence in the record that McCorkle was present at the restaurant on the evening of the incident. There is also no evidence that Bennett is an owner of B.H.B. Enterprises, Inc. All liability sustained by defendant was acquired through the actions of defendant’s employees. This is a classic example of vicarious liability. To ascribe to the majority’s definition of the word “managers” obliterates the meaning of the first sentence of G.S. § 1D-15(c).

Plaintiff presented no evidence that McCorkle, or any other “director, officer, or manager of the corporation participated in or condoned the conduct constituting the aggravating factor,” or ordered, or ratified outrageous conduct on the part of any of the corporation’s employees.

The majority’s expansion of the meaning of “managers” beyond its statutory context violates long established rules of statutory construction. “I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies.” *Chisom v. Roemer*, 501 U.S. 380, 404, 115 L. Ed. 2d 351, 369 (1991) (Scalia, J. dissenting) (citations omitted). “Today, however, the Court adopts a method quite out of accord with that usual practice. It begins not with what the statute says, but with an expectation about what the statute must mean As method, this is just backwards, and however much we may be attracted by the result it produces in a particular case, we should in every case resist it.” *Id.* at 405, 115 L. Ed. 2d at 369.

II. Corporate Complicity

North Carolina’s statute is neither unique nor dissimilar to other states. G.S. § 1D-15(c) is a codification of what other states term the “corporate complicity” rule, which requires express and explicit condoning of the act by a corporate defendant in order to be vicariously liable for punitive damages.

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Other jurisdictions have enacted similar statutes limiting punitive damages for vicarious liability. While no other state has an identical provision, some other statutes are illustrative of the limiting purposes behind our N.C. Gen. Stat. § 1D-15(c).

Kansas has adopted a statute similar to North Carolina. In K.S.A. § 60-3701(d), the legislature provided that: "In no case shall exemplary or punitive damages be assessed pursuant to this section against: (1) a principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer." K.S.A. § 60-3701(d). "K.S.A. § 60-3701(d)(1) limits punitive damages assessed to an employer only in circumstances where the employer has ratified or authorized the act of the employee . . . [T]he policy of Kansas regarding assessment of punitive damages against a corporation is that such damages may be assessed in accord with the complicity rule but not upon a vicarious liability rule." *Hartford Accident & Indem. Co. v. American Red Ball Transit Co., Inc.*, 938 P.2d 1281, 1292 (Kan. 1997).

In Illinois, "[t]he corporate-complicity rule allows for the imposition of punitive damages against a corporation *if a superior officer of the corporation ordered, participated in, or ratified outrageous conduct on the part of an employee.*" *Hargan v. Southwestern Elec. Co-op., Inc.*, 725 N.E.2d 807, 810-11 (Ill. App. 2000) (citing *Kemner v. Monsanto Co.*, 576 N.E.2d 1146, 1157 (1991) (emphasis supplied)).

The State of Idaho also follows the corporate complicity rule. "A corporation is liable for punitive damages based upon the acts of its agents *if the directors and managing officers* participated in, or authorized or ratified, the agents' acts." *Student Loan Fund of Idaho, Inc. v. Duerner*, 951 P.2d 1272, 1280 (Idaho. 1997) (emphasis supplied).

In North Carolina the General Assembly has spoken. G.S. § 1D-15(c) is clear and explicit. I concur with the majority's holding that defendant is vicariously liable in negligence for the actions of its employees. However, in the total absence of any evidence that "officers, directors, or managers of [defendant] corporation participated in or condoned the conduct . . .," I respectfully dissent from that portion of the majority's opinion that affirms the trial court's award of punitive damages against the corporate defendant based solely on vicarious liability. I would vacate that portion of the judgment awarding plaintiff punitive damages. I respectfully dissent.

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J. ALAN BARRINGER AND WIFE, JENNIE S. BARRINGER, PLAINTIFFS V. MID PINES
DEVELOPMENT GROUP, L.L.C., DEFENDANT

No. COA01-960

(Filed 3 September 2002)

1. Negligence— jury instructions—diversion

The trial court erred in a negligence case, where plaintiff husband was injured after tripping on an electrical cord at a buffet table, by refusing to give plaintiffs' requested jury instructions on diverted attention because: (1) plaintiffs showed their requested instruction was a correct statement of the law since the defense of contributory negligence cannot be asserted where defendant diverted plaintiff's attention preventing the visitor from discovering the obvious hazard; (2) plaintiff's requested instruction was supported by the evidence since defendant's manager even admitted that an attractive display of food attracts someone's attention; (3) the instruction given failed to encompass the substance of the law requested; and (4) the trial court's instruction did not provide the jury with a complete instruction on the law as it pertained to the facts of this case.

2. Evidence— hearsay—psychological test—unexplained conclusions

The trial court erred in a negligence case by admitting the unexplained conclusions of a psychological test, because: (1) the psychologist who administered the test was not present at trial; (2) there was no testimony at trial to establish that the test was properly administered; (3) there was no testimony whether results of the analysis were temporary or permanent; (4) the results were admitted for the truth of the matter asserted; and (5) the trial court provided no limiting instruction with respect to the testimony regarding the personality test.

Judge TYSON dissenting.

Appeal by plaintiffs from judgment entered 31 July 2000 by Judge Ronald L. Stephens in Wake County Superior Court and order entered 27 October 2000 by Judge Ronald L. Stephens denying plaintiffs' motion for new trial. Heard in the Court of Appeals 13 May 2002.

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The Jernigan Law Firm, by Leonard T. Jernigan, Jr. and N. Victor Farah, for plaintiff-appellants.

Cranfill, Sumner & Hartzog, L.L.P., by Patrick H. Flanagan and Jaye E. Bingham, for defendant-appellee.

EAGLES, Chief Judge.

J. Alan Barringer and Jennie S. Barringer (“plaintiffs”) appeal from judgment entered on a jury verdict finding Mid Pines Development Group, L.L.C. (“defendant”) negligent and J. Alan Barringer (“Mr. Barringer”) contributorily negligent.

On 16 November 1995, Mr. Barringer attended a workshop for the North Carolina Board of Examiners for Electrical Contractors at the Mid Pines Inn and Golf Club in Southern Pines. Defendant owns and manages Mid Pines Inn and Golf Club.

After a morning meeting, the participants in the workshop met for lunch in the “Terrace Room.” Mr. Barringer entered the Terrace Room and located where the members of his group were sitting. Mr. Barringer then went to the buffet table, made a sandwich and a salad, and then joined the others in his group at a table. After finishing his sandwich, Mr. Barringer returned to the buffet table for fruit. The buffet table ran parallel to a wall, approximately three feet from the wall. On this trip to the buffet table, Mr. Barringer picked up a bowl and went down the other side of the buffet table, the side nearest the wall. When Mr. Barringer finished selecting fruit from several displays, he turned and walked back along the same way, between the table and the wall. After he had taken a few steps, Mr. Barringer’s right foot became entangled in an electrical cord. The electrical cord connected a crock pot on the buffet table to an outlet on the wall. The electrical cord was not taped down to the floor and was approximately two to three inches off the ground. Mr. Barringer stumbled and fell injuring his back. Plaintiffs’ evidence details extensive treatment, including numerous surgeries, and continuing pain in Mr. Barringer’s right leg and lower back.

The plaintiffs commenced this action on 4 November 1998 by complaint alleging a personal injury claim based on defendant’s negligence and a loss of consortium claim. The matter was tried during the 10 July 2000 Civil Session of Wake County Superior Court. The jury returned a verdict finding defendant negligent and Mr. Barringer contributorily negligent. The judgment entered on 31 July 2000 pro-

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vided that the plaintiffs should recover nothing from defendant; that the plaintiffs' complaint be dismissed with prejudice; and that the costs of the action be taxed against the plaintiffs. On 27 October 2000, the trial court denied plaintiffs' motion for a new trial and injunctive relief while granting in part defendant's motion for costs and expenses in the amount of \$22,477.80. Plaintiffs appeal.

On appeal, plaintiffs contend that the trial court erred: (1) by refusing to give plaintiffs' requested jury instructions on diversion and contributory negligence; (2) by admitting the unexplained conclusions of a psychological test in contravention of *State v. Hoyle*, 49 N.C. App. 98, 270 S.E.2d 582 (1980), *disc. review denied*, 301 N.C. 724, 274 S.E.2d 233 (1981); (3) by refusing to allow plaintiffs to cross examine Mid Pines' manager about untruthful answers given in interrogatory answers concerning insurance coverage; and (4) by taxing plaintiffs with an expert witness fee of \$15,000.00 which included deposition and trial preparation time. After careful review, we reverse and remand.

[1] Plaintiffs first contend that the trial court erred by refusing to give plaintiffs' requested jury instructions on diversion. Plaintiffs requested the following jury instruction on diverted attention:

"A plaintiff may be contributorially [sic] negligent if he fails to discover and avoid a defect that is visible and obvious. However, this rule is not applicable where there is some fact, condition or circumstance which would or might divert the attention of an ordinarily prudent person from discovering or seeing an existing dangerous condition." *Walker v. Randolph Co.*, 251 N.C. 805, 810, 112 S.E.2d 551, 554 (1960) as cited in *Newton v. New Hanover Co. Board of Education*, 342 N.C. 554, 564, 467 S.E.2d [sic] 58, 65 (1996).

Plaintiffs argue that the "doctrine of diverted attention" has been used to mitigate the "harshness" of contributory negligence. Plaintiffs contend that the requested instruction was correct as a matter of law and that they introduced evidence at trial to support an inference that the buffet presentation was designed to be and was in fact a diversion. Plaintiffs argue that the trial court's instruction misled the jury "in that it failed to encompass all of the law on this issue." We agree.

The trial court did not give plaintiffs' requested instruction. The trial court gave the following instruction with regard to negligence:

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Now, under the law of this state, negligence refers to a person's failure to follow a duty of conduct as imposed by law. The law requires every owner of property to use ordinary care to keep the premises in a reasonably safe condition for lawful visitors who use them in a reasonable and ordinary manner.

Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect himself and others from injury. A person's failure to use ordinary care is negligence under the law of this state.

Now, ordinarily a person has that duty to anticipate the negligence on the part of others. In the absence of anything that gives or should give notice to the contrary, a person has the right to assume and to act under the assumption that others will use ordinary care and follow standards of conduct enacted as law in the safety of the public.

However, the right to rely on this assumption is not absolute, and if the circumstances existing at the time are such as reasonably to put a person on notice that he cannot rely on the assumption, he is under a duty to use that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect himself and others from injury.

With respect to the issue of contributory negligence, the trial court stated that "[t]he test of what is negligence is as I've already defined and read to you, explained to you, is the same for the Plaintiff as it is for Defendant."

"When a party aptly tenders a written request for a specific instruction which is correct in itself and supported by evidence, the failure of the court to give the instruction, at least in substance, is error." *Faeber v. E. C. T. Corp.*, 16 N.C. App. 429, 430, 192 S.E.2d 1, 2 (1972). "The trial court need not give special instructions exactly as requested by a party so long as the court's charge, taken as a whole, conveys the substance of the necessary requested instructions." *Alston v. Monk*, 92 N.C. App. 59, 63, 373 S.E.2d 463, 466 (1988), *disc. review denied*, 324 N.C. 246, 378 S.E.2d 420 (1989). To prevail on appeal, plaintiffs must show "that (1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to

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encompass the substance of the law requested and (4) such failure likely misled the jury.” *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274 (2002).

With respect to diverted attention, our Supreme Court has stated:

“When a person has exercised the care and caution which an ordinarily prudent person would have exercised under the same or similar circumstances, he is not negligent merely because he temporarily forgot or was inattentive to a known danger. *To forget or to be inattentive is not negligence unless it amounts to a failure to exercise ordinary care for one’s safety. Regard must be had to the exigencies of the situation, and the circumstances of the particular occasion. Circumstances may exist under which forgetfulness or inattention to a known danger may be consistent with the exercise of ordinary care, as where the situation requires one to give undivided attention to other matters, or is such as to produce hurry or confusion, or where conditions arise suddenly which are calculated to divert one’s attention momentarily from the danger. In order to excuse forgetfulness of, or inattention to, a known danger, some fact, condition, or circumstance must exist which would divert the mind or attention of an ordinarily prudent person; mere lapse of memory is not sufficient, and, if, under the same or similar circumstances, an ordinarily prudent person would not have forgotten or have been inattentive to the danger, such conduct constitutes negligence.*”

Dennis v. Albemarle, 242 N.C. 263, 268, 87 S.E.2d 561, 565-66, (citations omitted) (emphasis added), *reh’g dismissed*, 243 N.C. 221, 90 S.E.2d 532 (1955). *See also Hill v. Shanks*, 6 N.C. App. 255, 263, 170 S.E.2d 116, 121-22 (1969).

Plaintiffs must first show that their “requested instruction was a correct statement of law.” *Liborio*, 150 N.C. App. at 534, 564 S.E.2d at 274. In *Nourse v. Food Lion, Inc.*, 127 N.C. App. 235, 242, 488 S.E.2d 608, 613 (1997), *aff’d*, 347 N.C. 666, 496 S.E.2d 379 (1998), this Court reversed the trial court’s grant of summary judgment based on contributory negligence. This Court stated that:

[A] jury question is presented as to whether a reasonably prudent person would have looked down at the floor as she was shopping in the grocery store. A reasonably prudent person’s attention could easily be diverted by advertisements or fruit and vegetable

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displays. We cannot hold that as a matter of law under these circumstances the plaintiff in the exercise of "ordinary care" should have looked down at the floor.

Id. In *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 465, 279 S.E.2d 559, 561 (1981), the plaintiff was injured when she tripped over a platform that protruded into the store aisle. Our Supreme Court stated that:

[T]here is evidence that the display and the placing of the impulse items were intended to attract and keep the customer's attention at eye level. When a merchant entices a customer's eyes away from a hazardous condition, we do not think he should be heard to complain when his efforts succeed.

Id. at 469, 279 S.E.2d at 563-64. Plaintiffs' instruction is correct in "that the defense of contributory negligence cannot be asserted where the defendant diverted the plaintiff's attention, preventing the visitor from discovering the obvious hazard." *Hall v. Kmart Corp.*, 136 N.C. App. 839, 841, 525 S.E.2d 837, 839 (2000).

Next, plaintiffs' instruction must have been supported by the evidence. *Liborio*, 150 N.C. App. at 534, 564 S.E.2d at 274. Here, Helen Downie ("Downie"), the resort manager for Mid Pines Inn and Golf Club, was asked whether she would "agree that an attractive display of food attracts someone's attention." Downie responded that "[y]es, we eat with our eyes." (Emphasis added.) Mr. Barringer testified that "there was an extraordinary buffet, . . . all sorts of food and flowers." Dr. Gary Lebby, a research professor of electrical engineering and a participant at the workshop, testified about the buffet.

Q. Now when you first walked through that door and the Terrace Room, what's the first thing that you noticed?

A. Seemed to be tables with different dishes, meats, cakes.

Q. Are you talking about buffet tables?

A. Buffet tables, yes.

Q. How did it appear to you?

A. *Looked delicious.*

(Emphasis added.) The buffet table was "huge, several tables slid together." The buffet included "all sorts of food and flowers" including potato, chicken, turkey, and ham salads along with "fruit bowls"

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of fresh fruit, citrus fruit and melons. Plaintiffs' requested instruction was supported by the evidence.

The next question is whether "the instruction given, considered in its entirety, failed to encompass the substance of the law requested." *Liborio*, 150 N.C. App. at 534, 564 S.E.2d at 274. The trial court's instruction correctly stated a negligence and contributory negligence instruction. However, the instruction taken as a whole, does not "convey[] the substance of the necessary requested instruction[]." *Alston*, 92 N.C. App. at 63, 373 S.E.2d at 466. Plaintiffs' requested instruction contained language which would have instructed the jury that "where there is some fact, condition, or circumstance which would or might divert the attention of an ordinarily prudent person from discovering or seeing an existing dangerous condition, the general rule [of contributory negligence] does not apply." *Swinson v. Lejeune Motor Co.*, 147 N.C. App. 610, 613, 557 S.E.2d 112, 116 (2001). The trial court's instruction here "failed to encompass the substance of the law requested." *Liborio*, 150 N.C. App. at 534, 564 S.E.2d at 274.

Plaintiffs must also show "that the jury was misled or that the verdict was affected by an omitted instruction." *Bass v. Johnson*, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002). The trial court's instruction did not provide the jury with a complete instruction on the law as it pertained to the facts of this case. Because the jury returned a verdict of contributory negligence, we cannot say that the trial court's refusal to give the plaintiffs' requested instruction did not affect the verdict or mislead the jury.

Accordingly, the decision of the trial court is reversed and the matter is remanded to the trial court for a new trial. Our decision to reverse is based on the failure of the trial court to give appropriate instructions which would provide the jury with a fair statement of the law to enable them to weigh the evidence and testimony in this complex case. Even though inferences may be drawn from the evidence to support one party's version of the events, it is equally true that the same evidence can support alternate inferences which support the other party's version of the events. The jury is entitled to have complete instructions on the applicable law so they can fairly weigh the evidence and inferences when they deliberate.

[2] We next consider the issue of the admission into evidence of the Minnesota Multiphasic Personality Inventory ("MMPI"). Plaintiffs contend that the trial court erred by ignoring the holding of *State v. Hoyle* and admitting the "unexplained conclusions" of the MMPI.

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Plaintiffs argue that *Hoyle* held that an MMPI test, standing alone, is not admissible because it is prejudicial hearsay. Plaintiffs contend that the MMPI summary contained highly prejudicial terms, such as “psychopathic deviate,” “hypochondriasis,” and “hysteria.” We agree.

In *Hoyle*, a psychiatrist testified about the results of an MMPI administered by a psychologist who did not testify. This Court held “that the evidence in question was hearsay and incompetent, and its admission was highly prejudicial to defendant.” *Hoyle*, 49 N.C. App. at 103, 270 S.E.2d at 585. In reaching this holding, this Court stated that:

The record clearly shows that: (1) the psychologist who administered the test was not present at the trial of defendant and, therefore, could not be cross-examined; (2) there was not any testimony that the test in question was properly administered as required by instructions; (3) neither the psychologist who administered the test nor Dr. Rood stated whether the conditions found on the date of the examination were temporary or permanent in nature; (4) the complained of testimony was admitted to prove the truth of the matter asserted therein; and (5) the trial court did not instruct the jury to limit the evidence for a particular purpose.

Id. at 103, 270 S.E.2d at 584-85 (emphasis added).

Here, Mr. Barringer was given psychological testing, including an MMPI, at the Duke Pain Clinic on 23 October 1996. Dr. Wells Edmundson (“Dr. Edmundson”), Mr. Barringer’s primary care physician, testified that Elaine Crovitz, Ph.D. (“Dr. Crovitz”), a fellow in the Academy of Clinical Psychology, “performed the interpretation” of the MMPI. Defendant questioned Dr. Edmundson extensively about Dr. Crovitz’s report and introduced it into evidence.

In Dr. Crovitz’s report, the “Analysis of Test Data” section stated that “[d]espite defensiveness, clinical elevations were obtained on the following: Psychopathic Deviate (T=71), Hypochondriasis (T=88), Depression (T=80), Hysteria (T=82), Psyschaesthesia (T=72).”

The trial court allowed defendant to question Dr. Edmundson regarding the content of Dr. Crovitz’s interpretation of the MMPI. Dr. Edmundson read certain parts of the report into evidence and also read certain definitions from a medical dictionary. His testimony included:

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A The MMPI profile obtained reflects a *highly defensive orientation to test items, with the patient attempting to present himself in both a perfect and good light*. He has strong needs to be seen as . . . conscientious, reasonable, beyond criticism or reproach, and is likely to deny, minimize psychic issues. Despite defensiveness, clinical elevations were obtained on the following.

. . . .

Q Elevation would be above normal?

A Right.

. . . .

A [C]linical elevations were obtained on the following: Psychopathic, deviate, T equals 71.

Q Do you know—can you explain to the jury what *psychopathic, deviant or deviate* means?

A Some one [sic] who is out of the normal of society, I guess.

. . . .

A *Hypochondriac: A person with a somatic over concern, including morbid attention to the details of bodily function and exaggeration of any symptoms no matter how insignificant; second definition, a person manifesting hypochondriasis; and then the definition of hypochondria is: A morbid concern of ones own health and exaggerating attention to any unusual bodily or mental sensations, a dilusion [sic] that one is suffering from some disease for which no physical basis is evident.*

. . . .

Q If I may, what were the main components of *hypochondriasis*, was it morbid concern for—what was that?

A A morbid concern about ones own health.

Q If you can read on, I'll try to keep up?

A *An exaggeration of any symptoms, no matter how insignificant.*

. . . .

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Q How about *hysteria*?

A Well, you know, apparently *he scored a clinical elevation on hysteria*, but I just never—I'll bet you got this highlighted in the dictionary, too, but I never thought—

....

Q Okay. I understand in your assessment—can you look that definition up just so the jury can have that as one of the things to consider?

A Sure. *Hysteria: A somatic condition where there is an alteration or loss of physical function that suggests a physical disorder such as a paralysis of the arm or vision, but that's a complexion of psychological conflict or need.*

(Emphasis added.)

In closing arguments, defendant made reference to the definitions and argued the following:

Remember these diagnosis [sic]: *Psychopathic deviate, hypochondriasis, depression, hysteria, and psychasthenia*. Really want to talk about a couple of these. I'll read their definitions from Steadman's Medical Dictionary: *Hypochondriasis: A morbid concern about one's own health and exaggerated attention to any unusual bodily or mental sensation. A delusion that one is suffering from some disease for which no physical basis is evident. Hysteria: A somataform disorder in which there is an alteration or loss of physical dysfunctioning that suggests a physical disorder, such as paralysis of an arm or disturbance of vision, but that is instead apparently an expression of a psychological conflict or need.*

(Emphasis added.) Further, a defense exhibit which contained the terms “hypochondriasis” and “hysteria” and their definitions was admitted into evidence.

Here, as in *Hoyle*, the psychologist who administered the test was not present at the trial, there was no testimony at trial to establish that the test was properly administered, there was no testimony whether results of the analysis were temporary or permanent, the results were admitted for the truth of the matter asserted, and the trial court provided no limiting instruction with respect to the testimony regarding the MMPI.

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Defendant argues that the MMPI is admissible pursuant to Rule 803(6) of the North Carolina Rules of Evidence. Defendant argues that *Hoyle* is not controlling since it was decided before the adoption of the North Carolina Rules of Evidence. We are not persuaded.

“Rule 803(6) states that ‘[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge . . .’ is an exception to the hearsay rule.” *Chamberlain v. Thames*, 131 N.C. App. 705, 716, 509 S.E.2d 443, 449 (1998) (quoting G.S. § 8C-1, Rule 803(6)). “Rule 803(6) expressly permits the use of a custodian’s testimony to establish a foundation for admission of the record.” *CIT Grp./Commercial Servs., Inc. v. Vitale*, 148 N.C. App. 707, 709, 559 S.E.2d 275, 276 (2002).

The Commentary to Rule 803(6) states that this “exception is derived from the traditional business records exception.” G.S. § 8C-1, Rule 803(6) official commentary (2001). The business records exception is “one of the well recognized exceptions to the hearsay rule.” *Sims v. Insurance Co.*, 257 N.C. 32, 35, 125 S.E.2d 326, 328 (1962). Prior to the adoption of the Rules of Evidence, hospital records and medical records were admissible “under the business records exception to the hearsay rule” upon a proper foundation. *State v. Heiser*, 36 N.C. App. 358, 359, 244 S.E.2d 170, 172 (1978).

A proper foundation consists of the testimony by a witness familiar with such records and the system under which they are made that the record is authentic and that it was prepared at or near to the time of the event recorded by a person having personal knowledge of such event.

Id. A “hospital librarian or custodian of the record” could provide the requisite foundation for admission of the records. *Sims*, 257 N.C. at 35, 125 S.E.2d at 329.

The business records exception was followed by the courts of this State when *Hoyle* was decided. Even with the availability of the exception, the *Hoyle* court held “that the [MMPI] was hearsay and incompetent, and its admission was highly prejudicial to defendant.” *Hoyle*, 49 N.C. App. at 103, 270 S.E.2d at 585.

While a custodian’s affidavit may provide the necessary foundation for admission pursuant to Rule 803(6), we conclude that, the

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adoption of the North Carolina Rules of Evidence notwithstanding, *Hoyle* is applicable to the facts here. Accordingly, the testimony regarding Dr. Crovitz's interpretation of the MMPI, defendant's use of the terms and definitions in closing argument, and the use of a trial exhibit containing the terms and definitions prejudiced plaintiffs at trial and warrant a new trial.

We further note in passing that "as the cause must be remanded for the error herein pointed out, the costs will follow the final judgment." *Barrier v. Troutman*, 231 N.C. 47, 51, 55 S.E.2d 923, 926 (1949).

Accordingly, the decision of the trial court is reversed and the matter is remanded for a new trial.

Reversed and remanded.

Judge THOMAS concurs.

Judge TYSON dissents.

TYSON, Judge, dissenting.

The trial court properly withheld plaintiff's requested instruction on "diverted attention for two reasons": (1) the requested instruction was not a proper statement of the law, and (2) the requested instruction was not supported by the evidence. The trial court also properly admitted into evidence medical records under the North Carolina Rules of Evidence, Rule 803(6) (2001). The trial court did not err. I respectfully dissent.

I. Erroneous Statement of the Law

The trial court may exercise its discretion and refuse to give requested instructions based on erroneous statements of the law. *Haymore v. Thew Shovel Co.*, 116 N.C. App. 40, 49, 446 S.E.2d 865, 871 (1994) (citing *State v. Agnew*, 294 N.C. 382, 385, 241 S.E.2d 684, 692, cert. denied, 439 U.S. 830, 58 L. Ed. 2d 124 (1978)).

The majority's opinion adopts plaintiff's argument that "the 'doctrine of diverted attention' has been used to mitigate the 'harshness' of contributory negligence." Neither plaintiff nor the majority's opinion cite any case or any other authority for the proposition that a "doctrine" of diverted attention exists. I fail to find that any such "doctrine" exists. The cases cited by the plaintiff and the majority's

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opinion discuss “forgetfulness and inattentiveness” in the context of what constitutes negligence in general. The claimed “doctrine” is nothing more than a detailed explanation of the duty of ordinary care in varying circumstances and situations.

With respect to “inattentiveness” and “forgetfulness,” our Supreme Court stated that the issue is “if, under the same or similar circumstances, an ordinarily prudent person would not have forgotten or have been inattentive to the danger, such conduct constitutes negligence.” *Dennis v. Albermarle*, 242 N.C. 263, 268, 87 S.E.2d 561, 566 (1955) (quotation omitted).

Plaintiff requested the following instruction:

A plaintiff may be contributorily [sic] negligent if he fails to discover and avoid a defect that is visible and obvious. However, *this rule is not applicable* where there is some fact, condition or circumstance which might divert the attention of an ordinary prudent person from discovering or seeing an existing dangerous condition. (Emphasis supplied)

The requested instruction is not an accurate statement of the law. Plaintiff’s assertion is that the rule of *negligence does not apply* when a party’s attention is diverted. The question of whether a party acted as “an ordinary prudent person” always applies when determining whether a person was negligent. Plaintiff’s notion that that rule of an ordinary prudent person “is not applicable” misstates and is not a “fair statement of the law” as the majority holds. The jury must consider all the facts and circumstances in order to determine whether a party’s actions fell below those of an ordinary prudent person. The jury may not ignore, or fail to apply, the rule of contributory negligence as requested by plaintiff.

At bar, the trial court did not peremptorily grant summary judgment to defendant holding as a matter of law that plaintiff was contributorily negligent. Plaintiff freely argued, but failed to convince the jury, that plaintiff was not negligent due to being distracted by the buffet table’s attractive qualities. The trial court properly instructed the jury on negligence and contributory negligence and submitted those issues to the jury. The jury found plaintiff was contributorily negligent given all the facts, circumstances, and arguments surrounding the attractiveness of the buffet table and its ability to distract or divert plaintiff’s attention.

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II. Instruction Not Supported By Evidence

Even if one presumes that plaintiff's requested instruction was a correct statement of the law, from the facts presented, no circumstances existed nor can any inference be drawn that transforms plaintiff's forgetfulness or inattentiveness to anything other than negligence. Considering the evidence in the light most favorable to plaintiff, and affording him the benefit of every reasonable inference, plaintiff presented no circumstances or facts that (1) required plaintiff's undivided attention to other matters, (2) produced hurry or confusion to divert plaintiff's attention, (3) required plaintiff to react to conditions that arose suddenly which were calculated to divert plaintiff's attention momentarily from the danger, or (4) transformed plaintiff's actions from anything other than negligence. *Dennis*, 242 N.C. at 268, 87 S.E.2d at 565-66 (citation omitted). The evidence wholly fails to show or raise an inference that plaintiff was distracted by the buffet when he tripped over a plugged-in cord for three reasons.

First, plaintiff had availed himself of the buffet the day before and multiple times on the day that he tripped. Any attractive powers emanating from the buffet had ended long before plaintiff's multiple trips to the buffet on two consecutive days.

Second, after being told not to go behind the buffet, plaintiff squeezed between the rear wall and the buffet table. In order to walk between the table and the wall, plaintiff safely stepped over the same cord he later tripped over as he was leaving the area between the wall and the buffet table. Plaintiff successfully negotiated his entry step over the cord to get behind the table while claiming that "his attention was diverted" by the buffet table. Plaintiff cannot now claim his attention was diverted when, after serving his plate and leaving the table, he unsuccessfully attempted to return from whence he had successfully traveled on a prior occasion.

Third, plaintiff testified that after he finished filling his plate for a second time that day from the buffet, he "[l]ooked up, decided where my party was, where I needed to be. I turned, headed out the buffet bar." Even again presuming that the attractiveness of the buffet table was a diversion, there necessarily became a point in time when the buffet's all consuming attractiveness ended. Plaintiff fell when his attention was focused on returning to his seat, after his fascination with the buffet table had ended. The trial court did not err instructing the jury.

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III. Rule of Evidence 803(c)

Plaintiff also claims error to the admission at trial of testimony concerning his medical records. Any language from our Court in *State v. Hoyle*, 49 N.C. App. 98, 270 S.E.2d 582 (1980), *disc. rev. denied*, 301 N.C. 724, 274 S.E.2d 233 (1981) concerning “records of a regularly conducted activity” has been superceded. *Hoyle* was decided prior to the adoption of the North Carolina Rules of Evidence in 1983. Rule 803(6) now controls the admission of records of a regularly conducted activity at trial, not *Hoyle*. Under Rule 803(6), medical records may be admissible when there is an affidavit from a custodian of the records which shows that the record was made at or near the time of the evaluation, that the record was created by a person with knowledge, and the record was kept in the ordinary course of business. *Chamberlain v. Thames*, 131 N.C. App. 705, 716-17, 509 S.E.2d 443, 449-50 (1998) (“This affidavit satisfied the requirements of Rule 803(6).”)

Here, the record shows that defendant fully complied with all of the requirements of North Carolina Rule of Evidence 803(6), Records of Regularly Conducted Activity. Plaintiff was afforded the opportunity to depose the author of the report and subpoena her to appear at trial. Plaintiff declined all of the above. Medical records are not “cross-examined,” people are. There is no evidence in the record that plaintiff was unfairly surprised by the information elicited by defendant from plaintiff’s witness on cross-examination. I would overrule this assignment of error.

IV. Other Assignments of Error

The majority’s opinion does not reach plaintiff’s remaining assignments of error. I have thoroughly reviewed plaintiff’s remaining assignments of error, and find them without merit. The trial court correctly refused to allow cross-examination about defendant’s insurance coverage. Plaintiff also failed to show that the trial court abused its discretion in awarding expert witness fees. I would overrule plaintiff’s remaining assignments of error.

IV. Summary

The facts here do not approach with any similarity those facts in prior cases where “undivided attention to other matters” or “hurry or confusion” or “conditions arising suddenly” were present. On several occasions, plaintiff had traveled to the buffet, was warned not to go behind the table, and had safely traversed the same cord that he later

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tripped over. Plaintiff had fair and full opportunity to depose or call the author of the medical report as a witness at trial. Any reliance on *Hoyle* is misplaced due to the adoption of the North Carolina Rules of Evidence in 1983. From the evidence presented, after diligent argument from counsel and proper instructions, the jury unanimously found plaintiff to be contributorily negligent. I would affirm the decision of the trial court. I respectfully dissent.

STATE OF NORTH CAROLINA v. CHRISTOPHER WAYNE LIPPARD

No. COA01-735

(Filed 3 September 2002)

1. Constitutional Law— right to counsel—Sixth Amendment—adversary proceedings not begun

A murder defendant's Sixth Amendment right to counsel was not violated where he was interviewed in New Orleans by North Carolina detectives without his attorney present even though his attorney had asked that defendant not be interviewed. Defendant had been arrested but not indicted and his Sixth Amendment right to counsel had not attached. Moreover, defendant had knowingly waived his rights; the State's provision of constitutionally sufficient information will not be defeated because a defendant does not fully appreciate the ramifications.

2. Evidence— motion to suppress—findings and conclusions delayed

There was no prejudicial error in a murder prosecution where the court entered its findings and conclusions on a motion to suppress long after the suppression hearing. Defendant's contention that the delay affected his decision to testify was unsupported by the record.

3. Constitutional Law— right to counsel—not invoked

There was no error in a murder prosecution where defendant contended that an officer continued to question him after he invoked his right to counsel. Defendant stated that he didn't know whether he needed a lawyer, the officer responded that he wanted to leave his statement as it was, the officer reviewed his notes with defendant and did not ask further questions, the state-

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ment was typed, and defendant reviewed it, made changes, and signed it.

4. Criminal Law— remark to juror by deputy—mistrial denied

The trial court did not abuse its discretion by not declaring a mistrial in a murder prosecution where a deputy made a derogatory remark to an alternate juror about defendant's medical expert. The alternate juror was discharged, the remaining jurors examined, and the court found that there was nothing to indicate that any juror had been impaired.

5. Evidence— pathologist's testimony—number of gunshot wounds—speculative

The trial court did not err in a murder prosecution by allowing into evidence a pathologist's testimony that the victims had been shot more than once where defendant maintained that the testimony was speculative. The pathologist was more qualified than the jury to formulate an opinion about the number of gunshot wounds suffered by the victims.

Appeal by defendant from judgments entered 28 July 2000 by Judge James U. Downs in Haywood County Superior Court. Heard in the Court of Appeals 17 April 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Norma S. Harrell, for the State.

McKinney & Tallant, P.A., by Zeyland G. McKinney, Jr., for defendant appellant.

McCULLOUGH, Judge.

Defendant Christopher Lippard was tried before a jury at the 21 July 2000 Criminal Session of Haywood County Criminal Superior Court after being charged with four counts of first-degree murder and one count of second-degree murder. Evidence for the State showed defendant met Chad Watt in mid-September 1999. On the morning of 29 September, defendant and Watt had been drinking and looking for marijuana. Defendant and Watt went to Mark Stout's house and picked up Stout and his friend, Charles Roache. While defendant was driving Watts' car, he ran over something and punctured the car's gas tank. When Watt became upset about the damage, Roache and Stout beat him and threw him in the trunk of the car. Defendant drove to a wooded area where Roache hit Watt with a shotgun and, according to

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defendant, broke Watt's neck. Roache shot Watt in the eye, and defendant shot Watt in the head. The three men buried Watt in the woods and got a ride to Roache's house and Stout's house.

The men left the shotgun at Stout's house and put their clothes in a bag, which they later threw in a dumpster at a fish camp. Defendant returned to his grandparents' house and spent the night there. The next morning, defendant stole a 1970 Ford truck and went to Stout's house. Stout, defendant and Roache went to Wal-Mart, where defendant and Roache stole two pairs of boots. The men also stole a license plate from a similar truck in the parking lot. Stout gave defendant and Roache a sawed-off .20-gauge shotgun, ammunition, and a can of mace. As defendant and Roache left the area, they stole items from several vehicles and bought beer. They also stopped at a rest area and tried to rob a man, but he did not have a wallet.

The two traveled to Haywood County, situated near the North Carolina-Tennessee border, and exited Interstate 40 at Jonathan Creek. As defendant attempted a three-point turn, he backed the truck over a roadside embankment and was unable to get out. Defendant and Roache began walking down Rabbit Skin Road and looked for a car to steal. As the two walked along Earl Lane, they discovered the home of Earl and Cora Phillips.

Roache entered the house first, while defendant remained outside. Upon hearing screams and gunshots, defendant entered the house and saw Earl and Cora Phillips on the living room floor. Roache demanded guns, money, and car keys and searched for those items while defendant took \$50.00 from Mr. Phillips' wallet. Defendant put his hands on Mrs. Phillips' head to quiet her, and Roache shot her in the head. Defendant's shirt was covered with blood spatter from the wound. Roache shot Mr. Phillips in the head; he and defendant stole Mr. Phillips' Ford truck then left the house. Defendant lost control of the vehicle and flipped it a short distance from the house.

Defendant and Roache returned to the Phillips house to find another car to steal. As they stood in the yard, the Phillips' son Eddie grabbed defendant by the hair and the two fought. Roache shot Eddie, then went into the house alone. Defendant followed Roache inside after hearing more screams and gunshots and saw the body of Mitzi Phillips, Eddie's wife, in the kitchen. Defendant and Roache stole a maroon Saturn and soon wrecked it on Interstate 40. The two then split up. Defendant was befriended by Mr. Ricky Prestwood shortly after the murders. Mr. Prestwood bought defend-

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ant some clothes at the Salvation Army, let him wash his bloody clothes with Clorox and Dawn, and let him stay at his campsite overnight. The next day, Mr. Prestwood purchased a bus ticket to New Orleans for defendant and took him to the bus station.

Police were dispatched to the Phillips home at 9:59 p.m. Once there, they discovered the bodies of Earl and Cora Phillips in the living room of their home. The bodies of Mitzi Phillips and Eddie's and Mitzi's youngest daughter Katie Phillips were found in other rooms of the house. Eddie Phillips' body was found on the side of the road close to his parents' house. When he was discovered by a neighbor, he was still alive and tried to speak; however, he died shortly thereafter. Police found a Ford truck off Rabbit Skin Road, and also discovered Earl Phillips' Ford wrecked and lying upside down a short distance from the home. Witnesses saw two white men driving Mitzi Phillips' maroon Saturn at a high rate of speed. The car was headed toward Tennessee.

The officers collected shotgun shells and DNA evidence. The shells at the murder scene and near the stolen vehicles were fired from guns found in the maroon Saturn and near the Phillips home. Shells were found in all three vehicles. Defendant's DNA was found on the sawed-off shotgun retrieved from the Saturn.

On 1 October 1999, Roache was arrested near the Phillips home. He made an inculpatory statement to State Bureau of Investigation (SBI) agents admitting he shot the five members of the Phillips family, though he maintained two of the victims "were already dead" when he shot them. Roache also told the agents that defendant was with him at the Phillips home. Defendant was promptly charged with five counts of first-degree murder and a manhunt ensued. On 8 October 1999, defendant was apprehended in New Orleans and taken into custody by Louisiana authorities. Extradition proceedings were instituted against defendant pursuant to the Uniform Criminal Extradition Act; Louisiana counsel was appointed for him during those proceedings.

On 12 October 1999, defendant was interviewed by SBI Agent Toby Hayes in New Orleans. Though defendant learned his family had contacted a North Carolina lawyer for him, he told investigators that he did not need a lawyer and proceeded to give his statement to Agent Hayes. Defendant stated he shot the old lady (Cora Phillips) once, but she was already dead; later, he stated he did not know if he shot anyone. Defendant specifically told Agent Hayes he did not kill anyone

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and wanted to talk to the officers. Agent Hayes typed a statement based on his interview with defendant. Defendant read it, made some changes, and signed it. In the final statement, defendant insisted he did not shoot anyone or did not remember shooting anyone. Agent Hayes read the statement into evidence at trial.

During the trial, the State presented thirty-one witnesses, including Dr. John Butts, the Chief Medical Examiner for the State of North Carolina. Dr. Butts testified regarding the autopsies he performed on the victims. Defendant also put on medical evidence and presented a total of eleven witnesses. Defendant testified on his own behalf and stated that he thought Chad Watt was already dead as a result of Roache's shot and a broken neck, but he shot him anyway because Roache told him to do so and he did not want Watt to suffer. Defendant maintained he consumed more beer than Roache did and did not remember what happened. He did, however, contend that Roache masterminded the murders of the Phillips family. Defendant stated he entered the Phillips home after he heard gunshots, and admitted he held Cora Phillips' head down to quiet her and may have hit her head on the floor. Defendant denied taking money out of Earl Phillips' wallet. He also stated he saw Roache shoot both Earl and Cora Phillips. Defendant denied remembering that he fought with Eddie Phillips or saw Roache shooting Eddie, but he did remember being thrown to the ground and having his hair pulled. Defendant contended he never re-entered the house and never saw Mitzi or Katie Phillips. Defendant did not recall being in the maroon Saturn, but he did not deny it.

After receiving instructions from the trial court, the jury found defendant guilty of four counts of first-degree murder and one count of second-degree murder. Though defendant was tried capitally, the jury did not recommend the death penalty. The trial court sentenced defendant to four consecutive life terms for the first-degree murder convictions, and 220-273 months' imprisonment for the second-degree murder conviction. Defendant appealed.

On appeal, defendant argues the trial court erred by (I) denying his motion to suppress his statement; (II) refusing to declare a mistrial or to give curative instructions to the jury after it was disclosed that a jury officer commented on defendant's expert witness in the presence of the jury and an alternate juror talked with other jurors about newspaper accounts of the trial; and (III) allowing into evidence testimony from Dr. John Butts concerning the number of wounds suffered by Earl and Cora Phillips. For the reasons set

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forth herein, we disagree with defendant's arguments and conclude he received a trial free from error.

Motion to Suppress

[1] By his first assignment of error, defendant argues the trial court erred by allowing into evidence his statement to Agent Hayes concerning the murders of the five victims in this case. Specifically, defendant contends his Sixth Amendment right to counsel was violated when he was interviewed in New Orleans without his attorney present. He also maintains his rights under the Uniform Criminal Extradition Act and N.C. Gen. Stat. § 15A-734 (2001) were violated because he was arrested without a warrant, outside the State of North Carolina, and in violation of the Act. We do not agree.

Defendant gave a statement to Agent Hayes in New Orleans on 12 October 1999. Arrest warrants from North Carolina had already been issued for him on 4 October 1999, but no indictments were issued until 18 October. Defendant was taken into custody on 8 October 1999 pursuant to the North Carolina warrants and the Uniform Criminal Extradition Act; he subsequently waived extradition. Defendant's stepmother contacted Attorney Stephen Lindsay and asked him to represent defendant; defendant's father later ratified his wife's actions. Additionally, Judge Zoro Guice of the Haywood County Superior Court contacted Mr. Lindsay and requested that he accept appointment as counsel for defendant. Both Mr. Lindsay and Attorney Sean Devereux entered Notices of Appearance in Haywood County Superior Court on 12 October 1999.

Mr. Lindsay contacted the SBI, the New Orleans Assistant District Attorney, and the New Orleans Office of the Public Defender. He asked these individuals and entities not to question defendant or communicate with him about the case. Mr. Lindsay did not speak to defendant until 14 October 1999. Despite this fact, Agent Hayes and Detective Steve Allen of the Haywood County Sheriff's Department flew to New Orleans on 12 October 1999, interviewed defendant and obtained his statement. Defendant contends these actions violated his Sixth Amendment right to counsel because he was interviewed without his attorney present. We do not agree.

The Sixth Amendment right to counsel attaches only "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689, 32 L. Ed. 2d 411, 417

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(1972); *State v. Franklin*, 308 N.C. 682, 688, 304 S.E.2d 579, 583 (1983), *overruled on other grounds by State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985). In the recent case of *State v. Taylor*, 354 N.C. 28, 550 S.E.2d 141 (2001), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 221 (2002), our Supreme Court held that a suspect in custody in another state pursuant to the Uniform Criminal Extradition Act may be questioned in the other state at the officers' initiative without violating the suspect's constitutional rights to counsel. In the present case, it is undisputed that, at the time of defendant's interview and statement, no indictment had been drawn and no formal proceedings had been initiated against him. The fact that defendant had been arrested did not mean his Sixth Amendment right to counsel had attached. On this point, the *Taylor* Court stated:

An arrest warrant for first-degree murder in this state is not a formal charge as contemplated under *Kirby*. Defendant's Sixth Amendment right to counsel did not attach either at the issuance of the warrant or at the time of his arrest upon the warrant following his return to North Carolina.

Id. at 36, 550 S.E.2d at 147. We further note that "[w]ithout any attachment of the Sixth Amendment right to counsel, a suspect is free to waive the rights available to him under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), and its progeny." *Taylor*, 354 N.C. at 38, 550 S.E.2d at 148.

The United States Supreme Court has also held the Sixth Amendment right to counsel does not attach simply because an attorney may be acting for a defendant and trying to insulate him from questioning by law enforcement. *Moran v. Burbine*, 475 U.S. 412, 89 L. Ed. 2d 410 (1986). "[A] defendant's right to counsel is personal to him. He may waive this right although his attorney has instructed the investigating officers not to talk to him." *State v. Peterson*, 344 N.C. 172, 179, 472 S.E.2d 730, 733-34 (1996). Despite the fact that Mr. Lindsay asked law enforcement officers to refrain from questioning defendant, defendant was free to waive his right and speak to the officers. Thus, the main question for our review is whether defendant's statement was validly obtained.

A defendant's waiver is valid if it is determined that his decision not to rely on his rights was not the product of coercion, that he was aware at all times that he could remain silent and request counsel, and that he was cognizant of the intention of the prosecution to use his statements against him.

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State v. Barnes, 345 N.C. 184, 243, 481 S.E.2d 44, 77 (1997), *cert. denied by Chambers v. North Carolina*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), and *cert. denied by Barnes v. North Carolina*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). In the present case, Agent Hayes read defendant the standard *Miranda* warnings and informed defendant that he had an attorney in North Carolina. Agent Hayes testified:

[W]e advised Mr. Lippard of his rights and went as far as to tell him that we understood that he had been appointed attorneys in Asheville or in North Carolina to represent him and he indicated that he had no reason to speak with any court appointed attorney at this point and time.

Agent Hayes also testified defendant was not in distress, was not under the influence of drugs or alcohol, and answered all questions intelligently. When the officers informed defendant that they wanted to talk to him about the Haywood County murders, “he immediately replied that he did not need any attorney, that he saw some thing[s]—that he didn’t kill anyone, but he saw some things.” The evidence of record indicates defendant knowingly and intelligently waived his rights and voluntarily consented to discuss the murders with law enforcement officers. “[E]vidence indicating that the accused did not fully appreciate the ramifications resulting from the waiver will ‘not defeat the State’s showing that the information it provided to him satisfied the constitutional minimum.’ ” *Barnes*, 345 N.C. at 243, 481 S.E.2d at 77 (quoting *Patterson v. Illinois*, 487 U.S. 285, 294, 101 L. Ed. 2d 261, 273 (1988)). We conclude defendant’s statement was validly obtained.

[2] Defendant also maintains his statement should have been suppressed because the trial court’s findings of fact and conclusions of law were entered long after the suppression hearing, while the jury deliberated. Defendant contends the trial court’s actions amounted to a summary denial of his motion to suppress and constituted a violation of N.C. Gen. Stat. § 15A-977(d) (2001). However, our appellate courts have repeatedly held that a delay in the entry of findings of fact and conclusions of law does not amount to prejudicial error. *State v. Horner*, 310 N.C. 274, 311 S.E.2d 281 (1984).

Where the trial judge makes the determination [on a motion to suppress] after a hearing, as in this case, he must set forth in the record his findings of fact and conclusions of law. N.C. Gen. Stat. § 15A-977(d), (f) (1983). Findings and conclusions are required in order that there may be a meaningful appellate review of the deci-

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sion. The statute does not require that the findings be made in writing at the time of the ruling. Effective appellate review is not thwarted by the subsequent order.

Id. at 279, 311 S.E.2d at 285. *See also State v. Ainsworth*, 109 N.C. App. 136, 151-52, 426 S.E.2d 410, 419 (1993). Upon review of the record, we do not believe defendant has shown prejudice from the delay. First, defendant failed to assign error to the trial court's findings of fact. Thus, "they are conclusive and not reviewable on appeal." *Barnes*, 345 N.C. at 245, 481 S.E.2d at 78; *State v. Watkins*, 337 N.C. 437, 438, 446 S.E.2d 67, 68 (1994). Second, though defendant contends the delay prejudiced his case because he had no time to review the information before deciding whether to testify during trial, his contention is unsupported by the record.

[3] Finally, defendant argues that, despite his initial waiver, he invoked his right to counsel during the interview, but Agent Hayes continued to question him. Agent Hayes testified that, in the latter portion of the interview, defendant took a break and stated "he didn't know if he needed a lawyer." Agent Hayes told defendant "that was a decision that was solely his to make and he could either continue without a lawyer or he could terminate the interview at that point." When it was time to resume the interview, defendant "indicated that he wanted to leave his statement like it was prior[.]" Agent Hayes reviewed his notes with defendant and did not ask any further questions. The statement was later typed and defendant reviewed it. He made some changes, then signed the typed statement.

After examining the totality of the circumstances, the trial court concluded defendant waived his right to counsel and that his statement was voluntary. The trial court also made findings of fact and conclusions of law to that effect. We discern no error in those findings of fact and conclusions of law, nor do we perceive any prejudice to defendant. Defendant's first assignment of error is overruled.

Remarks of Jury Officer

[4] By his second assignment of error, defendant contends the trial court erred by refusing to declare a mistrial or give curative instructions to the jury with regard to remarks of a jury officer who commented on defendant's witnesses.

Just before the jury charge, one of the jurors informed the trial court that she had received several calls at her home the previous evening from the alternate juror, Mr. Lee. The trial court examined

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Mr. Lee outside the presence of the other jurors. Mr. Lee informed the trial court that “[w]e have one of the sheriffs out here that’s saying things that I don’t feel that should be said out here to the jury.” Specifically, Mr. Lee stated Deputy Parris said that if one person typed something, “they can pay somebody enough money to say that something was wrong with it,” and “some of the people who testified for the defense were paid to say what—were here to say because they were paid.” Mr. Lee believed the statements were made in reference to defendant’s medical expert, Dr. Hudson. Mr. Lee then told Deputy Parris, “that’s your opinion, that, you know, someone like this was hired[,]” and Deputy Parris responded with a derogatory remark. Mr. Lee informed the trial court that this exchange took place just after Dr. Hudson testified, and he believed about half the jurors were present when the remarks were made.

The trial court brought the jury back to the courtroom and asked them whether they heard Deputy Parris’ remarks. Three jurors responded affirmatively. The trial court questioned each of the three jurors and allowed both the State and defendant to question them. Each of the jurors stated they were not influenced by the comments and could make a fair and impartial decision after the presentation of all the evidence.

The trial court then asked the rest of the jurors whether they recalled the conversation or heard Deputy Parris’ comments about the trial. None of the jurors responded affirmatively. The State argued that Mr. Lee initiated the conversation with Deputy Parris and failed to follow the trial court’s directions. The trial court discharged alternate juror Lee, then asked whether any of the jurors recalled Mr. Lee talking with them about newspaper accounts or news broadcasts regarding the case. One juror responded affirmatively. The juror related his discussion with Mr. Lee, but stated that Mr. Lee’s comments did not influence him and he believed he was able to follow the trial court’s instructions and render a fair and impartial decision at the conclusion of all the evidence.

The trial court made findings of fact regarding Mr. Lee, Deputy Parris, and the jurors. The trial court specifically found that if any misconduct occurred, “it was between [Deputy Parris] and Mr. Lee.” The trial court also found and concluded that

there is nothing before the court that any juror has been impacted by any of the matters brought before the court this morning; and that all have stated they are of a fair and impartial mind and can

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continue to give this case their attention and their impartiality and fairness in accordance with their oath until it's concluded.

The trial court denied defendant's motions to dismiss and for a mistrial, and refused to give special instructions with regard to compensation of an expert. The trial court did, however, give an instruction about consideration of an expert's testimony, based on the pattern jury instructions.

The trial court has the power to declare a mistrial pursuant to N.C. Gen. Stat. § 15A-1061 (2001), which states:

Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.

Defendant argues the trial court should have granted his motion for a mistrial because Deputy Parris' and Mr. Lee's comments were made just after defendant's medical expert, Dr. Hudson, testified. The testimony was critical to the case because Dr. Hudson opined that each victim was shot only once, thereby corroborating defendant's position that he was not a willing participant in the murders.

As previously noted, upon learning of the alleged misconduct, the trial court made a proper inquiry and determined that none of the jurors had been improperly influenced by the conversations involving Mr. Lee and Deputy Parris.

"In North Carolina, in instances when the contention was made by the defendant that the jury has been improperly influenced, it has been held that it must be shown that the jury was actually prejudiced against the defendant, to avail the defendant relief from the verdict, and the findings of the trial judge upon the evidence and facts are conclusive and not reviewable."

State v. Bonney, 329 N.C. 61, 83, 405 S.E.2d 145, 158 (1991) (quoting *State v. Hart*, 226 N.C. 200, 203, 37 S.E.2d 487, 489 (1946)). In the present case, defendant has not shown that any of the jurors were influenced by the alleged misconduct, and he is therefore not entitled to a mistrial. See *State v. Brown*, 335 N.C. 477, 488, 439 S.E.2d 589, 596 (1994). The decision to declare a mistrial lies within the sound discretion of the trial court and will be reversed only upon a

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showing of a manifest abuse of discretion. *State v. Perkins*, 345 N.C. 254, 277, 481 S.E.2d 25, 34, *cert. denied*, 522 U.S. 837, 139 L. Ed. 2d 64 (1997). We also note that “[m]isconduct is determined by the facts and circumstances in each case. The trial judge is in a better position to investigate any allegations of misconduct, question witnesses and observe their demeanor, and make appropriate findings.” *State v. Harris*, 145 N.C. App. 570, 576, 551 S.E.2d 499, 503-04 (2001) (quoting *State v. Drake*, 31 N.C. App. 187, 190, 229 S.E.2d 51, 54 (1976)), *appeal dismissed, disc. review denied*, 355 N.C. 218, 560 S.E.2d 146 (2002).

The trial court examined the jurors about the alleged misconduct and found as a fact that there was no evidence to support defendant’s allegation of prejudice to his case. The trial court’s findings of fact were supported by substantial evidence and, in turn, supported the conclusions of law and the subsequent denial of the motion for a mistrial. Because we discern no error or abuse of the trial court’s discretion in denying defendant’s motion for a mistrial, defendant’s second assignment of error is overruled.

Medical Testimony

[5] By his final assignment of error, defendant contends the trial court erred by allowing into evidence the testimony of Dr. John Butts regarding the possibility that Earl and Cora Phillips were each shot more than once. Defendant maintains Dr. Butts’ testimony was merely speculative and unsupported by the autopsies, as he was unable to find more than one exit wound on either Earl or Cora Phillips. We disagree.

Dr. Butts was tendered by the State as an expert in forensic pathology. He testified, over objection, that he noted defects in the palates of both Earl and Cora Phillips when he performed their autopsies. Based on the round shape of the holes and other factors, Dr. Butts testified there could have been second gunshot wounds inflicted upon each of them. Dr. Butts readily stated he was not certain that second gunshot wounds were sustained by the victims. With regard to Earl Phillips, Dr. Butts stated the first bullet did not account for the wound on Mr. Phillips’ palate. With regard to Cora Phillips, Dr. Butts testified the damage to her head from the gunshot wound was so extensive he was unable to tell whether there had been one or two bullets fired into her head.

Defendant argues Dr. Butts’ testimony was speculative and inadmissible. However, Dr. Butts was testifying in his area of expertise,

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was more qualified than the jury to formulate an opinion regarding the number of gunshot wounds suffered by the victims, and was allowed to testify to his opinions about matters that could not be determined with certainty. Dr. Butts' testimony was the result of his expert observations and his performance of the autopsies on Earl and Cora Phillips.

Upon review, we believe Dr. Butts' testimony constituted permissible opinion testimony under N.C. Gen. Stat. § 8C-1, Rule 702(a) (2001), which states:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

Furthermore,

[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.C. Gen. Stat. § 8C-1, Rule 703 (2001). These rules of evidence have been applied in *State v. Eason*, 328 N.C. 409, 422, 402 S.E.2d 809, 815 (1991) (expert allowed to testify that a fire was intentionally set, where his conclusion was based upon the elimination of any accidental source for the fire); and *State v. Cummings*, 346 N.C. 291, 320, 488 S.E.2d 550, 567 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998) (forensic pathologist allowed to testify a victim's wound was consistent with his being shot while seated even though the pathologist was not present and could not say with certainty that the victim was seated when shot).

The fact that there was uncertainty about whether the victims suffered one or two shots each went to the weight of the evidence, not its admissibility. *State v. Reynolds*, 307 N.C. 184, 197, 297 S.E.2d 532, 540 (1982). Finally, even if the evidence was improperly admitted, defendant has not shown prejudicial error. See N.C. Gen. Stat. § 15A-1443(a) (2001); and *State v. Chavis*, 141 N.C. App. 553, 566, 540 S.E.2d 404, 414 (2000). Lastly, we note defendant presented no evidence that the jury convicted him based on the medical testimony of

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possible second gunshot wounds to Earl and Cora Phillips. The jury convicted defendant of the murders based on the felony-murder rule, with first-degree kidnapping, first-degree burglary, and armed robbery as the underlying felonies. Defendant's final assignment of error is overruled.

After careful review of the record and the arguments of the parties, we conclude defendant received a fair trial, free from prejudicial error.

No error.

Judges WYNN and BIGGS concur.

STATE OF NORTH CAROLINA v. LEON MAURICE AGER

No. COA00-1327

(Filed 3 September 2002)

Criminal Law— guilty plea—motion to withdraw—denied

The trial court did not err by denying defendant's motion to withdraw a guilty plea to first-degree murder where defendant never asserted his legal innocence; the case for premeditation and deliberation was not "weak"; the record is silent as to the length of time between the entry of the plea and defendant's desire to withdraw it; defense counsel was effective; defendant was competent at the time of the plea; there was plenary evidence that defendant's plea was not made hastily; and, while defendant argued a lack of prejudice to the State, the defendant must first meet his burden of showing a fair and just reason for withdrawal.

Judge BIGGS dissenting.

Appeal by defendant from judgment entered 18 November 1999 by Judge Robert P. Johnston in Cleveland County Superior Court. Heard in the Court of Appeals 10 October 2001.

Attorney General Roy A. Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

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TIMMONS-GOODSON, Judge.

Leon Maurice Ager ("defendant") seeks appellate review, by appeal and petition for writ of certiorari, from the judgment entered on his guilty plea.

On or about 4 March 1996, defendant pled guilty to the first-degree murder of his fiancée, Vanessa Haynes. The State's summary of evidence during the entry of plea, made without any objection from defendant, tended to show the following: On the evening of 30 December 1995, Haynes was driving her eleven-year-old son to the child's grandmother's home, when she and defendant, who occupied the back seat, began to argue. When Haynes pulled onto the shoulder of the road and instructed defendant to get out of the vehicle, defendant shot Haynes at point-blank range with a .22 caliber pistol. Haynes died immediately. Defendant subsequently told a responding officer of the Shelby Police Department that he shot Haynes because she was always "disrespecting him" and "going out to get drunk." Judge Forrest A. Ferrell accepted defendant's plea, but upon the motion of trial counsel, continued judgment in the case until counsel could prepare adequately for defendant's capital sentencing hearing.

Defendant subsequently moved to withdraw his guilty plea, arguing that "fair and just" reasons existed for withdrawal of his guilty plea on or about 26 November 1997. This matter was heard by Judge Ronald K. Payne on 16 January 1998; and after a full evidentiary hearing, Judge Payne found no fair and just reason to permit defendant's withdrawal of his guilty plea. Judge Payne, therefore, denied defendant's motion.

On 1 July 1999, defendant filed a "Motion for Appropriate Relief" pursuant to the post-conviction provisions of Chapter 15A, article 89 of our General Statutes. However, since judgment had been continued in this matter, Judge Forrest D. Bridges apprised counsel that a post-conviction motion for relief was not properly before him. Judge Bridges, with the approval of defense counsel, treated the filing as a motion to reconsider the motion to withdraw the guilty plea. After hearing the testimony, and reviewing the evidence of record from defendant's entry of plea and the hearing on his motion to withdraw his guilty plea, Judge Bridges found and concluded that defendant had failed to present any "newly discovered evidence," so as to entitle him to reconsideration of his motion to withdraw his guilty plea.

The case then proceeded to capital sentencing during the 8 November 1999 criminal session of superior court before Judge

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Robert P. Johnston. The jury recommended life imprisonment, and the trial court entered judgment accordingly on 18 November 1999. Defendant appeals, and limited by the provisions of N.C. Gen. Stat. § 15A-1444(e), seeks review of the trial court's order denying his motion to withdraw his guilty plea. Defendant also petitions for writ of certiorari to review other issues outside of those permitted by N.C. Gen. Stat. § 15A-1444(e).

On appeal, defendant argues that his guilty plea must be vacated because the evidence presented at the hearing on his motion to withdraw his plea constituted "fair and just" reason to entitle him to withdraw his plea. We disagree.

The standard to be utilized in considering a pre-sentence motion to withdraw a guilty plea is well settled: a trial court should allow a defendant to withdraw his guilty plea upon his showing that "any fair and just reason" exists for such relief. *State v. Handy*, 326 N.C. 532, 538, 391 S.E.2d 159, 162 (1990); *see also State v. Meyer*, 330 N.C. 738, 743, 412 S.E.2d 339, 342 (1992) (providing that a defendant bears the burden of showing that fair and just reason exists for the withdrawal of his guilty plea). In *Handy*, the Supreme Court provided a laundry list of factors to be considered when addressing a motion to withdraw a guilty plea:

Some of the factors which favor withdrawal include whether the defendant has asserted legal innocence, the strength of the State's proffer of evidence, the length of time between entry of the guilty plea and the desire to change it, and whether the accused has had competent counsel at all relevant times. Misunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion are also factors for consideration. The State may refute the movant's showing by evidence of concrete prejudice to its case by reason of the withdrawal of the plea. Prejudice to the State is a germane factor against granting a motion to withdraw.

326 N.C. at 539, 391 S.E.2d at 163 (citations omitted). This Court's review of the trial court's ruling on a motion to withdraw a guilty plea requires an "independent review of the record" to determine whether there existed a fair and just reason for the trial court to have allowed the motion. *Id.* at 539, 391 S.E.2d at 163.

In the instant case, the evidence tends to show that on or about 31 October 1995, defendant was involved in an automobile accident. This accident resulted in the death of his uncle and serious injuries,

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including head injuries, to defendant. Defendant received medical treatment for his injuries, which included emergency brain surgery, and was taking several anti-seizure medications as a result of his head injuries. Thereafter, defendant received continuing treatment for his head injuries at the Charlotte Institute of Rehabilitation, was seen by a plastic surgeon to address his facial injuries, and underwent speech therapy with speech therapist, Shannon McCool, to assist him in with speech deficiencies which occurred as a result of the October 1995 car accident.

Some two months after the October 1995 car accident, on 30 December 1995, defendant shot his fiancée at point-blank range, in front of her eleven-year-old son. Defendant told the officer, who responded to the scene, that he shot Haynes because she was always “disrespecting him” and “going out to get drunk.”

Two attorneys were appointed to represent defendant in this case just two days after his arrest. Counsel began to immediately act on the case. Initially, counsel filed a Motion Questioning Defendant’s Capacity to Proceed, and the trial court entered an order appointing a local certified forensic examiner, who recommended further evaluation at Dorthea Dix Hospital. On that next day, 5 January 1996, counsel filed a motion to have defendant examined at Dorthea Dix Hospital, and again the trial court allowed counsel’s motion and entered an order committing defendant to Dix for up to 60 days.

Defendant pled guilty, against the advice of trial counsel, on 4 March 1996, some 65 days after his arrest and notably, just before trial was to begin on three other violent felonies against the present victim. After defendant instructed counsel that he wanted to plead guilty to murder, counsel negotiated an agreement with the State, obligating the State to dismiss those other charges—attempted murder, assault with a deadly weapon with intent to kill inflicting serious injury, and first-degree burglary—against defendant, in exchange for his guilty plea. While under oath during the entry of his plea, defendant testified that counsel had explained the murder charge against him, as well as those felony charges that the State had agreed to dismiss. Furthermore, although defendant later testified during his motion hearing that he had only met with trial counsel twice prior to the entry of his guilty plea, defendant previously testified that he had talked to counsel on eight to ten occasions and had asked all of the questions he desired. When questioned by the court, defendant replied that he was satisfied with counsel’s representation. Importantly, although defendant expressed a desire to die, counsel

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fought diligently to prevent defendant from receiving a death sentence: after entry of defendant's guilty plea, counsel sought additional forensic and psychological examination of defendant in preparation for sentencing; and it appears that counsel ordered defendant's medical records from various hospitals (with the exception of the records of defendant's speech therapist from Cleveland Regional Medical Center), at which defendant had received treatment both before and after the 31 October 1995 car accident resulting in his head injuries.

At the hearing on his motion to withdraw his plea, defendant testified that it was not until after seeing psychiatrists and talking with other inmates that he decided to withdraw his plea. Defendant could not, however, remember when this change of heart occurred. Further, although he asserted that he sent his attorneys a letter expressing his wish to withdraw his plea, counsel did not produce such a letter or elucidate on when defendant changed his mind about pleading guilty. Defendant's motion to withdraw his guilty plea was filed with the superior court approximately twenty months after his guilty plea was tendered and accepted by Judge Ferrell.

At the hearing on the motion to withdraw, the report of Dr. Nicole Wolfe, the Associate Director of Forensic Psychiatry at Dortha Dix Hospital, was submitted. Therein, Dr. Wolfe opined that defendant was capable of proceeding to trial (contingent upon his continuing to take his medication), and that he understood the charges against him. Dr. Wolfe further felt that defendant understood his position relative to the proceedings and was capable of working with an attorney to prepare his defense. At the time of the entry of his guilty plea, defendant was taking his anti-seizure medicine, but because of "personal reasons" had stopped taking his Prozac, an anti-depressant, just two weeks before the entry of plea. While defendant attempts to make much of the fact that he had stopped taking his Prozac, in derogation of Dr. Wolfe's contingency statement, during the entry of plea, Judge Ferrell made a thorough inquiry into defendant's competency and his state of mind. Defendant assured the judge that his decision to plead guilty was a firm decision, having been made more than a month and a half previously, and that he had not wavered from it. Defendant did not present any psychiatric testimony at the entry of plea or at the motion to withdraw hearing to show that his failure to take his Prozac, one of several medications which had been prescribed to him, would result in his plea being unknowing or involuntary. Notably, speech therapist Shannon McCool testified that defendant had short-

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term memory deficits that would have rendered him unable to understand and respond to the open-ended questions posed by the trial court during the entry of his guilty plea in March 1996. However, after extensive questioning from the trial court, it readily appeared that McCool's conclusions in this regard were in error. Near the end of the hearing on defendant's motion to withdraw his guilty plea, the State admitted that a withdrawal of the plea would not cause the State "any prejudice outside the ordinary prejudice caused by the two-year delay between the offense [and the trial]."

Upon an independent review of the record, the Court concludes that Judge Payne did not err in denying defendant's motion to withdraw his guilty plea. First, defendant never asserted his legal innocence. His contention that his was not a case of first-degree murder is based upon what psychiatrists and death row inmates told him. Defendant admitted culpability to the responding officer shortly after the commission of the offense, while under oath during the entry of his guilty plea, and during the January 1996 hearing on his motion to withdraw his guilty plea.

Second, based upon defendant's admission at the scene of the murder to the responding officer and the eye witness account of the victim's son, we further conclude that the State's case for premeditation and deliberation was not "weak" as alleged by defendant. Third, the record is eerily silent as to the length of time between the entry of the plea and defendant's desire to withdraw it. Defendant could not remember the date or time frame in which he made his decision to withdraw his plea and during closing arguments at the January 1998 hearing, counsel admitted that defendant's request was not "at an early stage" but "some months later." The only concrete evidence of the length of time between the entry of the plea and defendant's desire to withdraw that plea is the twenty-month period between the entry of plea and the filing of defendant's motion to withdraw. Even assuming that it took counsel six or seven months to prepare the motion, it appears that there was still a significant amount of time between the entry of defendant's plea and his desire to change his plea.

Fourth, we wholly reject defendant's claim of ineffective assistance of counsel. On this record, defendant cannot satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984), and adopted by this State in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). Indeed, the evidence tends to show that counsel immediately went to

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work on defendant's case upon appointment, made numerous filings to obtain expert evaluation of defendant's competency, and fought and won a battle to save defendant's life, despite defendant's wish to die. The only evidence not uncovered by counsel prior to the entry of defendant's plea was the evidence of defendant's treatment by speech therapist Shannon McCool at Cleveland Regional Medical Center for speech impairment and short-term memory difficulties he suffered after a October 1995 car accident. Based on the present evidence, we simply cannot say that defendant has shown that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial," so as to be entitled to relief here. See *Hill v. Lockhart*, 474 U.S. 52, 59, 88 L. Ed.2d 203, 210 (1985) (noting that to satisfy the "prejudice" prong of the *Strickland* test in the context of a guilty plea, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial[.]").

Fifth, we conclude that defendant was competent, within the meaning of G.S. § 15A-1001(a) at the time of the entry of plea. See N.C. Gen. Stat. § 15A-1001(a) (2001) (defining incompetence as where "by reason of mental illness or defect [the defendant] is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner[.]"). Defendant attempts to make much of the short period between the October 1995 accident, which resulted in his head injuries, and the December 1995 murder of his fiancée. However, the record reveals that defendant had a long history of depression, chronic drug use, and violence. In fact, defendant had several felony charges, involving violence against this victim, pending in the superior court at the time that he killed his fiancée. In addition, defendant's failure to take one of his medications, the anti-depressant Prozac, was notably for his own "personal reasons," and did not seem to affect his ability to understand the proceedings before him. In fact, the stenographic transcript of the plea proceedings tends to show that defendant had made up his mind to plead guilty a month and a half earlier and was steadfast in that decision at the time that he entered his plea. Therefore, we reject defendant's argument that defendant's failure to take his Prozac for two weeks prior to the entry of plea, would "nullify" Dr. Wolfe's expert opinion that defendant was competent to stand trial and understood the proceedings. See *State v. Reid*, 38 N.C. App. 547, 550, 248 S.E.2d 390, 392 (1978) (holding that the trial court's finding of competency could not be upheld since the examining psychiatrist's conclusion

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that the defendant's schizophrenia was in remission and he was therefore competent to stand trial was nullified by testimony at trial that the psychiatrist had not seen the defendant some two or three months thereafter, and could not state an opinion whether defendant was still competent at the time of trial), *disc. review denied*, 296 N.C. 588, 254 S.E.2d 31 (1979). Defendant was taking all of his other medications at the time that he entered his plea, and responded while under oath that he knowingly and voluntarily entered his plea. Absent clear and convincing evidence to the contrary, defendant will be bound by such an assertion. *See Little v. Allsbrook*, 731 F.2d 238 (4th Cir. 1984). To that same end, we also conclude that there is no evidence that defendant was confused during the entry of plea. While the excerpts from the *Physician's Desk Reference* and *The Essential Guide to Prescription Drugs*, submitted as support for defendant's argument to the contrary, list mental confusion as a probable, possible, or rare side-effect of the medications that defendant was taking at the time that his plea was entered, we note that the evidence of record does not show that the medication had this effect on defendant at the time in question. Moreover, contrary to defendant's assertions, we find no evidence of confusion on the part of counsel or Judge Ferrell, nor how such confusion prejudiced defendant.

Sixth, plenary evidence shows that defendant's plea was not made hastily. The plea was made 65 days after defendant's arrest, after discussion of the matter with, and against the advice of, counsel. Notably, the plea was made just as three other violent felonies were to be tried; and as part of the negotiated plea, the State agreed to drop those charges in exchange for defendant's guilty plea. During the entry of defendant's plea, defendant told Judge Forrest that despite the advice of counsel, he had made up his mind to plead guilty and "think that this is the best way and onliest [sic] way justice can be served." It, therefore, seems that defendant's decision was made after some thought.

Finally, although defendant argues that lack of prejudice to the State in and of itself constitutes a "fair and just reason" to allow the withdrawal of his guilty plea, under *Handy*, the defendant must first meet his burden of showing the existence of a fair and just reason for withdrawal, and then, and only then, is the State required to come forward with evidence to "refute the movant's showing by evidence of concrete prejudice to its case by reason of the withdrawal of the plea." 326 N.C. at 539, 391 S.E.2d at 163.

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In sum, we hold that defendant failed to meet his burden of showing that there existed a fair and just reason to allow him to withdraw his guilty plea. Accordingly, we affirm Judge Payne's order denying defendant's motion to withdraw his guilty plea. In light of our holding in this regard, we deny defendant's petition for writ of certiorari in which he recapitulates his entitlement to relief from his guilty plea. *See State v. Grundler and State v. Jelly*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (providing that the writ of certiorari is a discretionary writ to be granted only upon a showing of "good and sufficient cause;" and that "[t]he petition for the writ must show merit or that error was probably committed below[]"), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960). Judgment affirmed; petition for certiorari denied.

Judge McGEE concurs.

Judge BIGGS dissents.

BIGGS, Judge dissenting.

Because I believe the defendant offered fair and just reason to withdraw his plea of guilty to first degree murder, I respectfully dissent.

In reviewing the trial court's ruling on a motion to withdraw a guilty plea, this Court does not apply an abuse of discretion standard, but instead conducts an independent review of the record. This independent review should consider the reasons offered by the defendant in conjunction with any prejudice to the State, and determine if it would be fair and just to allow defendant's motion to withdraw his plea of guilty. *State v. Davis*, — N.C. App. —, —, 562 S.E.2d 590, 592 (2002).

"A 'fair and just' reason for withdrawing a guilty plea is one that 'essentially challenges . . . the fairness of the [plea] proceeding.'" *United States v. Puckett*, 61 F.3d 1092, 1099 (4th Cir. 1995) (citation omitted). Further, although the majority opinion accurately enumerates factors appropriate for a court's consideration in ruling on a motion to withdraw a plea, "these factors are only balancing considerations," *United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991), rather than a 'laundry list' as suggested by the majority. "In general, 'a presentence motion to withdraw a plea of guilty should be allowed for *any* fair and just reason.'" *State v. Davis*, — N.C. App. at —, 562 S.E.2d at 592 (quoting *State v. Handy*, 326 N.C. 532, 539, 391 S.E.2d 159, 162 (1990)) (emphasis added).

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In the instant case, it is undisputed that defendant: (1) had a significant history of substance abuse and emotional problems; (2) had been subject to involuntary commitment proceedings within the two years preceding the subject offense; (3) suffered severe skull injuries in a motor vehicle accident two months before the offense, requiring surgery, and resulting in some cognitive impairment; (4) repeatedly expressed suicidal desires; and (5) explicitly and repeatedly stated an intention to employ the criminal justice system to kill himself, even asking for a “speedy death penalty”. Further, although the Cleveland County forensic examiner and the forensic psychiatrist at Dix hospital reached differing conclusions regarding defendant’s competency to stand trial, the forensic psychiatrist explicitly determined that defendant’s “capacity to proceed [was] contingent upon his taking his medications as prescribed.” The transcript, however, establishes unequivocally that defendant had abruptly discontinued prescribed Prozac a week or so before the entry of the plea:

THE COURT: When was the last time, if at all, you used or consumed any such substance?

DEFENDANT: This morning.

THE COURT: And what was that, sir?

DEFENDANT: I took Dilantin, um, Tegretal, Orudis, Prozac.

MR. FARFOUR: He did not take his Prozac this morning. He’s been on Prozac up until about a week ago.

....

THE COURT: So as a result of an automobile accident you were involved in in October, you have—you have a head injury. Tell me about that.

DEFENDANT: . . . I dropped off a fifty foot cliff. I . . . I sustained a fractured skull, and . . . and they had to do brain surgery and replace my skull. And basically, I was bleeding from the brain.

Moreover, the plea transcript reveals what the forensic psychiatrist termed defendant’s “suicidal ideation.” Defendant repeatedly expressed to the court during the plea hearing that his aim in pleading guilty was to obtain the death penalty:

DEFENDANT: . . . I want to plead guilty to first degree murder and—with the possibility of death. That’s my objective. I mean

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that's the onliest way I feel like I can make it up to her family, my family, and the community.

....

DEFENDANT: . . . Your Honor, I'm just ready to get this over with as soon as possible so it won't be no more trauma—I mean, on her kids, especially, and my kids. I think that—I *think that death is the onliest way*. And I'm saying this from my heart.

...

THE COURT: *You understand* under the law of North Carolina, *the maximum punishment* for first degree murder *may be death*?

....

DEFENDANT: Yes, that's—*that's what I prefer*.

....

DEFENDANT: Okay, yes, I have one question that I asked my attorneys.

THE COURT: Yes, sir.

....

DEFENDANT: I know *they came out* with new law or something, you know, about a *speedy death penalty* that—something that you don't have to—I mean, you can violate—I mean, you don't have to—you can turn down your appeal. That's—ain't that the new law now? That's why I'm trying to ask. I would like to know.

....

DEFENDANT: Okay. What I was—I mean—I mean, since this—since I've been in Raleigh, and I have a clear mind, I've been—I've *been going to death myself, too*. . . . (emphasis added)

Next, in considering the time frame in which defendant moved to set aside his plea of guilty, I find it significant that defendant entered a plea of guilty, against the advice of counsel, just a few weeks after his return from Dix hospital. Defendant pled guilty to first degree murder just two months after his arrest, even before the mandatory Rule 24 conference had taken place. Admittedly, a period of perhaps six months to a year passed, after the plea hearing, before defendant contacted his attorneys seeking to withdraw his plea. However, this is

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consistent with what Dr. Coleman, a forensic psychologist who conducted a neuropsychological evaluation of defendant, described as the “predictable course of recovery of function following brain injury . . . [in which] maximum improvement is obtained within eighteen months or so[.]” While the majority opinion stresses the length of time it took defendant to move to withdraw his plea of guilty, it is noteworthy that defendant’s motion was presented two years *before* his sentencing. Thus, I agree with the majority opinion that no particular prejudice inured to the state by virtue of defendant’s delay.

Defendant has not asserted his factual innocence of the offense of first degree murder and, based on the state’s proffer of a factual basis for the plea, it would appear pointless to do so. However, due to the substantial evidence in the record of defendant’s mental instability, a trial of this case might well yield a different result.

Finally, like the majority opinion, I reject defendant’s contention of ineffective assistance of counsel. However, the record and transcript of plea clearly demonstrate that defendant entered a plea of guilty in order to receive the death penalty, as a means of perhaps carrying out his suicidal ideation; that at the time of entry of plea he was on several psychoactive medications; that he had discontinued one of the medications, notwithstanding the forensic psychiatrist’s opinion that his competency to proceed depended on taking medications as prescribed; that the plea was entered within a few months of his suffering brain injury in an accident; and that the plea was entered against the advice of counsel. Because I believe there is compelling evidence of ‘fair and just’ reason to allow defendant to withdraw his plea, and the state demonstrated no prejudice, I would reverse.

DAVID W. WHITE, PLAINTIFF V. KATHY H. WHITE, DEFENDANT

No. COA01-1105

(Filed 3 September 2002)

1. Civil Procedure— Rule 60 motion—improper for seeking amendment or modification instead of relief

The trial court did not err in an equitable distribution case by denying defendant former wife’s motion under N.C.G.S. § 1A-1, Rule 60 requesting a modification or an amendment of a 1998

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qualifying order, because defendant did not seek to be relieved of the judgment.

2. Divorce— equitable distribution—military retirement pension

The trial court erred in an equitable distribution case by denying defendant former wife's motion in the cause requesting the trial court to enter a modified or amended qualifying order increasing defendant's percentage of plaintiff former husband's retired military pay for as long as the pension remains reduced due to plaintiff's subsequent election of a disability payment that waived a portion of his retirement pay because: (1) although the trial court thought it was without authority to address the issues raised by defendant, defendant was not seeking to have the trial court treat plaintiff's disability benefits as divisible marital property but instead sought a modification or amendment of the 1998 qualifying order providing that defendant is entitled to an increased percentage of plaintiff's retirement pay; (2) the federal Uniformed Services Former Spouses' Protection Act expressly contemplates that orders from state courts requesting direct payment to former spouses may be modified if they are from the same state as the original order; and (3) the 1998 qualifying order itself expressly provides that it shall remain in effect until further order of the court.

Judge WYNN dissenting.

Appeal by defendant from orders entered 21 March 2001 and 10 April 2001 by Judge J. H. Corpening, II in New Hanover County District Court. Heard in the Court of Appeals 5 June 2002.

Hosford & Hosford, P.L.L.C., by Sofie W. Hosford, for plaintiff-appellee.

Lea, Clyburn & Rhine, by James W. Lea, III and Lori W. Rosbrugh, for defendant-appellant.

HUNTER, Judge.

Kathy H. White ("defendant") appeals the trial court's orders denying two motions in which defendant sought modification of an Amended Qualifying Order entered in 1998 by the trial court. The 1998 Qualifying Order had directed the Uniformed Services Retirement System to make payments directly to defendant from the retirement benefits of her former husband, David W. White ("plain-

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tiff”), in accordance with an equitable distribution “Consent Order” entered in 1990 distributing the marital property of defendant and plaintiff. The trial court denied defendant’s motions. We reverse as to defendant’s Motion in the Cause.

I. Factual Background and Procedural History

Plaintiff and defendant married in 1974 and divorced in 1989. Plaintiff was a member of the United States Coast Guard (“the Coast Guard”) and a participant in the Uniformed Services Retirement Program throughout the marriage. The parties divorced prior to the plaintiff’s retirement from the Coast Guard. Upon divorce, the parties voluntarily entered into an agreement for the distribution of the marital property, which agreement was adopted by the trial court and incorporated into a Consent Order entered 17 July 1990. By the terms of the Consent Order, defendant became entitled to “[o]ne-half of the Plaintiff’s pension accumulated [during the marriage].”

Eight years later, in 1998, plaintiff retired from the Coast Guard and the trial court, upon defendant’s motion, entered an Amended Qualifying Order (“the 1998 Qualifying Order”) providing that defendant was entitled to receive the designated monthly benefits directly from the Plan Administrator. Defendant began to receive one-half of plaintiff’s retired pay accumulated during the marriage, or \$429.28 (later increased to \$465.00 as a result of a “cost of living increase”). This amount was approximately twenty-nine percent (29%) of plaintiff’s total monthly retired pay.

In April 1998, plaintiff was hospitalized for depression. Plaintiff applied for disability benefits, and, in 1999, the Veteran’s Administration (“the VA”) determined that plaintiff had suffered a disability as a result of his service. The VA awarded plaintiff disability benefits, which benefits, unlike retired pay, are tax free income. In order to receive these disability benefits, however, plaintiff was required to waive a corresponding amount of his retired pay. *See* 38 U.S.C. § 5305 (1998). In other words, plaintiff continued to receive the same overall amount of benefits, but one portion was classified as non-taxable disability benefits while the remainder was classified as taxable retired pay. Although defendant continued to receive one-half of plaintiff’s retired pay accumulated during the marriage, she did not receive any portion of plaintiff’s disability benefits. Thus, the actual amount she received decreased significantly because the amount of benefits classified as retired pay decreased. According to defendant, she began to receive only approximately fifteen percent (15%) of plaintiff’s total

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benefits (or \$236.09 per month), as compared to twenty-nine (29%) (or \$465.00 per month). In short, plaintiff unilaterally acted so as to diminish defendant's share of plaintiff's monthly benefits while simultaneously maintaining his own monthly benefits, as well as increasing his after-tax income.

In 2001, defendant filed two motions: (1) a Motion in the Cause, and (2) a Motion Pursuant to Rule 60 of the North Carolina Rules of Civil Procedure. By her Motion in the Cause, defendant requested that the trial court enter a Second Amended Qualifying Order (modifying the 1998 Qualifying Order) requiring plaintiff to pay to defendant an increased percentage of plaintiff's retired pay. Defendant also sought reimbursement for the loss of benefits she incurred over the preceding twenty months since the date plaintiff started receiving disability benefits. Defendant's Motion Pursuant to Rule 60 similarly sought an amendment of the 1998 Qualifying Order to increase defendant's share of plaintiff's retired pay, and "such other and further relief as to the Court may seem just and proper."

In March and April of 2001, the trial court denied defendant's motions in two separate orders. In these two orders, the trial court found as fact that: since applying for disability benefits, plaintiff has been employed in various capacities, including a position with the Coast Guard at a salary of \$44,000 per year; since determining that plaintiff had suffered a disability, the VA had not reviewed plaintiff's disability; and plaintiff was not currently taking medication for depression and had not seen a psychologist or psychiatrist in six months. The trial court also found that defendant's share of plaintiff's benefits had been reduced from \$459.28 to \$236.09 per month as a result of plaintiff waiving a portion of his retired pay in order to receive disability benefits. However, in both orders, the trial court concluded as a matter of law that it was without authority to address the issues raised by defendant because "[f]ederal law continues to preempt state law on the issue of dividing upon divorce military retirement pay that has been waived to receive disability benefits." In response to defendant's Motion Pursuant to Rule 60, the court also stated: "This Court declines Defendant's request to set aside the 1990 Consent Order with regard to equitable distribution" Defendant appeals the denial of both motions.

II. Analysis

[1] We first briefly address defendant's Motion Pursuant to Rule 60 because we believe this motion must be denied on procedural

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grounds. Rule 60(b) of the North Carolina Rules of Civil Procedure (“Rule 60(b)”) allows a court to “relieve a party . . . from a final judgment, order, or proceeding” under certain circumstances. N.C. Gen. Stat. § 1A-1, Rule 60(b) (2001). Defendant’s Motion Pursuant to Rule 60 does not seek *relief* from the 1998 Qualifying Order; rather, the motion expressly requests a modification or an amendment of the 1998 Qualifying Order. Thus, defendant’s motion pursuant to Rule 60(b) was improper. *See Coleman v. Arnette*, 48 N.C. App. 733, 269 S.E.2d 755 (1980) (holding that a motion to amend a divorce judgment was not properly made pursuant to Rule 60(b)(6) because the movant sought to amend the judgment rather than to be relieved of the judgment). For this reason, we affirm the trial court’s denial of the Motion Pursuant to Rule 60.¹

[2] As to defendant’s Motion in the Cause, defendant specifically requested that the trial court enter a modified or amended Qualifying Order increasing defendant’s percentage of plaintiff’s retired pay “for as long as the pension remains reduced due to a disability payment.” As noted above, the trial court concluded it was without authority to address the issues raised by defendant in her motions. We review the trial court’s conclusion of law *de novo*. *See, e.g., Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 513 S.E.2d 572 (1999). We hold that the trial court’s conclusion of law constitutes reversible error.

“[D]omestic relations are preeminently matters of state law,” and “Congress, when it passes general legislation, rarely intends to displace state authority in this area.” *Mansell*, 490 U.S. at 587, 104

1. Defendant does not argue that she is entitled to one-half of plaintiff’s total retirement benefits (including his disability benefits) pursuant to the contract between the parties regarding distribution of the marital property (as incorporated into the 1990 Consent Order). However, we note that the holding in *Mansell v. Mansell*, 490 U.S. 581, 104 L. Ed. 2d 675 (1989), does not prohibit military spouses from contracting away their disability benefits. *Mansell* held only that state courts could not treat veterans’ disability pay as marital or community property; the Court did not consider whether such disability benefits could be divided and distributed to a former spouse pursuant to a contract entered into between the parties. *See Mansell*, 490 U.S. at 587, 104 L. Ed. 2d at 684 n.6; *see also, In re MacMeeken*, 117 B.R. 642, 647 n.2 (D. Kan. 1990); *In re Marriage of Stone*, 908 P.2d 670, 673 (Mont. 1995); *Hoskins v. Skojec*, 696 N.Y.S.2d 303, 305 (N.Y. App. Div. 1999); *Price v. Price*, 480 S.E.2d 92, 93 (S.C. Ct. App. 1996); *McLellan v. McLellan*, 533 S.E.2d 635, 638 (Va. Ct. App. 2000). In fact, on remand, the California Court of Appeals held that the parties could agree to treat the husband’s gross retirement pay as community property (even though, under *Mansell*, the trial court itself could not do so), and that the court could enforce this agreement between the parties. *See In re Marriage of Mansell*, 217 Cal. App. 3d 219, 265 Cal. Rptr. 227 (1989). Significantly, the United States Supreme Court denied petitions for *certiorari* and *mandamus* to review this holding. *See Mansell v. Mansell*, 498 U.S. 806, 112 L. Ed. 2d 197 (1990).

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L. Ed. 2d at 684. As a result, federal preemption in domestic relations law is only found in the rare instances where Congress has “ “positively required by direct enactment” ’ ” that state law be preempted. *Id.* (citations omitted).

The federal Uniformed Services Former Spouses’ Protection Act (“FSPA”) permits state courts to treat all “disposable retired pay” as divisible marital property. *See* 10 U.S.C. § 1408(c)(1) (1998); *Bishop v. Bishop*, 113 N.C. App. 725, 733, 440 S.E.2d 591, 597 (1994). However, the FSPA defines “disposable retired pay” to expressly exclude military retirement pay waived to receive a corresponding amount of VA disability benefits pursuant to Title 38 of the United States Code, or military disability retirement pay pursuant to Chapter 61 of Title 10. *See* 10 U.S.C. § 1408(a)(4) (1998); *Bishop*, 113 N.C. App. at 733-34, 440 S.E.2d at 597.² In *Mansell*, faced with “one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations,” *Mansell*, 490 U.S. at 587, 104 L. Ed. 2d at 684, the Supreme Court held that the FSPA “does not grant state courts the power to treat as [marital property] military retirement pay that has been waived to receive veterans['] disability benefits.” *Mansell*, 490 U.S. at 594-95, 104 L. Ed. 2d at 689.

Apparently, the trial court here interpreted this prohibition, which is based upon the doctrine of federal preemption, so broadly that it concluded it was without authority to address the issues raised in defendant’s motions. However, the holding in *Mansell* was actually quite narrow. Pursuant to *Mansell*, a state court may not “treat as [marital property] military retirement pay that has been waived to receive veterans['] disability benefits.” *Mansell*, 490 U.S. at 595, 104 L. Ed. 2d at 689.

Here, defendant was not seeking to have the trial court treat plaintiff’s disability benefits as divisible marital property. Rather, defendant merely sought a modification, or amendment, of the 1998 Qualifying Order, providing that defendant is entitled to an increased percentage of plaintiff’s retired pay. We see no reason why the trial court would be without authority to consider defendant’s request for a modification, or amendment, of the 1998 Qualifying Order. The FSPA expressly contemplates that orders from state courts requesting direct payment to former spouses may be modified if they are from the same state as the original order. *See* 10 U.S.C. § 1408(d)

2. Veterans often choose to waive a portion of their retired pay to receive an equal amount of disability benefits because disability benefits are not taxable as income. *See* 38 U.S.C. § 5301(a) (1998); *Mansell*, 490 U.S. at 583-84, 104 L. Ed. 2d at 682.

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(1998). Furthermore, the 1998 Qualifying Order itself expressly provides that it “shall remain in effect until further Order of the Court.”

For these reasons, we hold that the trial court has authority to address the issues raised by defendant in her Motion in the Cause. Specifically, the trial court has authority to address the issue of whether defendant, as a result of plaintiff's waiver of a portion of his retired pay in order to receive disability benefits, is entitled to a modification of the 1998 Qualifying Order in order to effectuate the terms of the original 1990 Consent Order providing that defendant is entitled to “[o]ne-half of the Plaintiff's pension accumulated [during the marriage].”

The dissent contends that we have overstepped the parameters of the issues raised by defendant in her Motion in the Cause and on appeal by addressing “the issue of whether the defendant should be allowed to thwart the spirit of *Mansell* to have the court reconfigure her percentage to give her the same benefit she would have obtained if plaintiff had not elected to receive disability benefits.” The dissent's concern is misplaced for two reasons. First, the issue addressed herein—whether the trial court has authority to amend a qualifying order to increase one spouse's share of the other spouse's retired pay—is precisely the issue raised by defendant in her Motion in the Cause and on appeal. In addition, the relief defendant seeks is not contrary to the “spirit” of *Mansell*. As numerous courts, including this Court, have previously noted, neither *Mansell* nor the FSPA prohibits a state court from considering a former spouse's federal disability payments (replacing a corresponding amount of retired pay) when configuring the distribution of marital property upon divorce. *See, e.g., Bishop*, 113 N.C. App. at 734, 440 S.E.2d at 597 (citing *Clauson v. Clauson*, 831 P.2d 1257, 1263 (Alaska 1992)). Likewise, we believe neither *Mansell* nor the FSPA prohibits a state court from amending a qualifying order to increase a non-military spouse's share of a military spouse's retirement pay where the military spouse has, subsequent to the original qualifying order, elected to receive disability benefits in place of retired pay.

In summary, we affirm the trial court's denial of defendant's Motion Pursuant to Rule 60. However, we reverse the denial of defendant's Motion in the Cause and remand to the trial court.

Affirmed in part, reversed in part, and remanded.

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Judge THOMAS concurs.

Judge WYNN dissents in a separate opinion.

WYNN, Judge dissenting.

I dissent from the majority opinion because the issue addressed by the majority regarding the defendant's Motion in the Cause was not presented by either the Motion in the Cause, or by the defendant's appeal to this Court. The majority invites this issue by stating, "defendant specifically requested that the trial court enter a modified or amended Qualifying Order increasing defendant's percentage of plaintiff's retired pay 'for as long as the pension remains reduced due to a disability payment.'" Having set the stage with this introduction, the majority inferentially states that "defendant was not seeking to have the trial court treat plaintiff's disability benefits as divisible marital property. Rather, defendant merely sought a modification, or amendment, of the 1998 Qualifying Order, providing that defendant is entitled to an increased percentage of plaintiff's retired pay."

In fact, defendant's Motion in the Cause, appended to this dissent, sought to enforce the Consent Order and agreement of the parties that defendant would receive "[o]ne-half of any and all pension benefits accumulated [during the marriage]" which amounted to 29.4% of plaintiff's retirement benefits. Defendant alleged that the election by the plaintiff to receive disability benefits altered her percentage from 29.4% to 15%. Thus, defendant contended the plaintiff's disability benefits "come from the same source and the disability benefits are in actuality retirement benefits the Court had previously assigned to Defendant and to which the Defendant should be entitled." In other words, defendant's motion was based upon the contention that, under the Consent Order she is entitled to one-half of all of plaintiff's benefits, including his retired pay benefits *and* his disability benefits. Accordingly, defendant sought to have the trial court, "Require the Plaintiff to restore to the Defendant her full pension benefit by increasing her percentage of the reduced pension benefit from 29.4% to 57.0%" In essence, defendant sought an increase in benefits that would have the same effect as treating the disability benefits as marital property which is prohibited by *Mansell v. Mansell*, 490 U.S. 581, 104 L. Ed. 2d 675 (1989).

Recognizing defendant's veiled attempt to thwart the plain language of the statutory and case law, Judge Corpening correctly con-

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cluded that, “Federal law continues to preempt state law on the issue of dividing upon divorce military retirement pay that has been waived to receive disability benefits.”

It is further significant to point out that in this appeal, defendant presents only two issues for our consideration.

First, defendant contends that the trial court erred by failing to find that plaintiff was not disabled and therefore was not entitled to received disability income. Defendant argues that

By the unilateral actions of the Plaintiff in converting retirement pay into disability benefits after a portion of the retirement pay was awarded to the Defendant, the Uniformed Services Former Spouses’ Protection Act (USFSPA) has become a hindrance to Defendant in obtaining what is legally hers. In order to correct this inequity, the Defendant moved the trial court, pursuant to Rule 60 of the North Carolina Rules of Civil Procedure, to use its authority under state law, without running afoul of the Supremacy Clause, to reapportion an equitable distribution of the parties’ marital property based on the Plaintiff’s post dissolution acts.

Second, defendant contends that the trial court erred by failing to make findings that she is entitled to an unequal distribution of plaintiff’s remaining pension income. In support of this contention, defendant argues:

The force of the federal preemption should not extend so as to preclude the state courts from awarding the Defendant fifty-percent (50%) of the Plaintiff’s military retirement pay out of assets he has other than his VA disability benefits. It would be consistent with both North Carolina law and the USFSPA for the trial court to consider the VA benefits received by the Plaintiff as a distributional factor in awarding the Defendant an unequal division in her favor, using assets other than the VA benefits themselves.

No argument is made by either party concerning the issue of whether the defendant should be allowed to thwart the spirit of *Mansell* to have the court reconfigure her percentage to give her the same benefit she would have obtained if plaintiff had not elected to receive disability benefits. Likewise, the issue of whether *Mansell* prohibits military spouses from contracting away their disability benefits is not presented by this appeal and remains for another day.

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In sum, while the issue addressed by the majority may indeed be an interesting issue to resolve, it is not presented at all by this appeal. I, therefore, dissent from the decision of the majority to reverse the trial court's order on that basis.

APPENDIX

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

COUNTY OF NEW HANOVER

DISTRICT COURT DIVISION

89 CVD 1214

DAVID W. WHITE

Plaintiff,

v.

KATHY H. WHITE,

Defendant

MOTION IN THE CAUSE

NOW COMES the Defendant, and moves this Court for an Order requiring the Plaintiff to pay to the Defendant the full amount of pension benefits she would have been entitled to, except for the unilateral actions of the Plaintiff, and in support thereof shows the Court as follows:

1. That on or about the 17th day of July, 1990 the parties entered into a Consent Order with regard to the issue of equitable distribution.

2. Pursuant to that Consent Order the Defendant was to be granted one-half of any and all pension benefits accumulated during the course of the marriage.

3. That on or about the 22nd day of May, 1998 a Qualified Domestic Relations Order was entered in this matter providing that the Defendant would receive one-half of the Plaintiff's United States Coast Guard pension benefits which were accumulated during the course of the marriage. The Defendant's portion amounts to 29.4% of the Plaintiff's entire pension benefit.

4. When the Order was entered and accepted by the U. S. Coast Guard, Plaintiff's Disposable Retired Pay became \$1,582.17, after the survivor's benefit charge was applied. Plaintiff's share was \$1,102.89 and Defendant's share was \$429.28. A cost of living increase later raised Defendant's share to \$465.00

5. After receiving notice that the Defendant would begin receiving a portion of his retirement benefits, the Plaintiff, without the knowledge or approval of the Defendant, made application to have a portion of his benefits converted to "disability benefits". This request

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was granted and thereafter the disability benefits were paid to Plaintiff and the total amount of the disability payment was subtracted from the pension before it was divided between the two parties. As a result of the Plaintiff's actions, the Defendant's monthly benefit was reduced by \$223.19 from \$459.28 to \$236.09 per month, while Plaintiff's benefits of pension plus disability payment increased by the same amount. This altered the percentage division from 71% for Plaintiff and 29% for Defendant to 85% for Plaintiff and 15% for Defendant. The actions on behalf of the Plaintiff were done for the sole purpose of reducing the benefits to which the Defendant was entitled, and increasing the Plaintiff's portion of a benefit that had already been fairly divided by the Court.

6. That these benefits come from the same source and the disability benefits are in actuality retirement benefits the Court had previously assigned to Defendant and to which the Defendant should still be entitled.

WHEREFORE the Defendant prays this Court for an Order to do the following:

a. Require the Plaintiff to restore the Defendant her full pension benefit by increasing her percentage of the reduced pension benefit from 29.4% to 57.0% for as long as the pension remains reduced due to a disability payment, and to secure this benefit with a Second Amended Qualifying Order for Uniformed Services Retirement System Military Retired Pay, to be prepared by Defendant's attorney.

b. Require the Plaintiff to reimburse Defendant, within sixty days of the date of the Order, for the twenty months that her portion of the pension has been reduced, in the amount of \$4,463.80.

c. Such other and further relief as to the Court may seem just and proper.

This the ____ day of January, 2000.

LEA, CLYBURN & RHINE

(s) JAMES W. LEA, III

JAMES W. LEA, III

State Bar No. 9323

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STATIC CONTROL COMPONENTS, INC. v. VOGLER

[152 N.C. App. 599 (2002)]

STATIC CONTROL COMPONENTS, INC., PLAINTIFF-APPELLANT V.
WILLIAM H. VOGLER, JR., DEFENDANT-APPELLEE

No. COA01-1077

(Filed 3 September 2002)

1. Pleadings— Rule 11 sanctions—complaint not well-grounded in fact or based upon reasonable inquiry

The trial court did not err in a trade secrets and breach of contract case by imposing sanctions against plaintiff corporation under N.C.G.S. § 1A-1, Rule 11 based on the verified complaint not being well-grounded in fact or based upon a reasonable inquiry because the complaint alleged then-existing direct competition and ongoing misappropriation and disclosure of trade secrets, and both of these allegations were directly contradicted by the deposition testimony of plaintiff's operating manager and plaintiff's president and CEO.

2. Pleadings— Rule 11 sanctions—complaint filed for improper purpose

The trial court did not err in a trade secrets and breach of contract case by imposing sanctions against plaintiff corporation under N.C.G.S. § 1A-1, Rule 11 based on the trial court's conclusion that the complaint was filed for an improper purpose, because: (1) an improper purpose is for a purpose other than one to vindicate rights or to put claims of right to a proper test; and (2) the testimony of plaintiff's president and CEO established that the purpose of the lawsuit was not to redress injury by defendant, but to extract from defendant another letter promising to uphold the parties' agreement.

3. Pleadings— Rule 11 sanctions—survival of summary judgment motion not a bar

The trial court did not err in a trade secrets and breach of contract case by imposing sanctions against plaintiff corporation under N.C.G.S. § 1A-1, Rule 11 even though plaintiff had obtained a preliminary injunction and had survived defendant's summary judgment motion, because the denial of a summary judgment motion is not a bar to Rule 11 sanctions since a claim may appear to raise legitimate and genuine issues before trial but later be unmasked as not well-founded in fact.

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4. Pleadings— Rule 11 sanctions—timeliness of motion

The trial court did not err in a trade secrets and breach of contract case by concluding that defendant moved for N.C.G.S. § 1A-1, Rule 11 sanctions in a timely fashion, because: (1) the impropriety of plaintiff's claims only came into focus during discovery; (2) plaintiff voluntarily dismissed the action four days after its CEO was deposed, and defendant wrote a letter to plaintiff seeking a settlement three weeks after the dismissal; and (3) defendant moved for sanctions after plaintiff failed to respond after three months to defendant's attempt to settle the case.

Appeal by plaintiff from order entered 31 May 2001 by Judge J. B. Allen, Jr. in Lee County Superior Court. Heard in the Court of Appeals 4 June 2002.

Static Control Components, Inc., by William L. London, III, for plaintiff-appellant.

Moore & Van Allen, P.L.L.C., by Andrew B. Cohen and John E. Slaughter, III, for plaintiff-appellant.

Staton, Perkinson, Doster, Post, and Silverman, P.A., by Jonathan Silverman and Charles M. Oldham, III, for defendant-appellee.

BIGGS, Judge.

Plaintiff (Static Control Components, Inc.) appeals from an order imposing sanctions under N.C.G.S. § 1A-1, Rule 11. We affirm the trial court.

Plaintiff, a corporation with over 1000 employees, is engaged in the production and sale of components used in the remanufacture of toner cartridges for computer laser printers. Plaintiff sells certain constituent components used in the remanufacture process and has never sold finished remanufactured cartridges. Defendant was employed by plaintiff from 1995 to 2000. Shortly after he was hired, defendant signed an agreement promising not to reveal any information pertaining to "customers, suppliers, competitors, and manufacturing processes" of plaintiff's products, both those currently manufactured as well as "products in various stages of development." The agreement provided that it would remain in effect for three years after defendant quit working for plaintiff. In January, 2000, defendant left plaintiff's employ. Shortly thereafter, he and another former

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employee of plaintiff's, Walter Huffman, started a small remanufacturing business. The two men had no other employees, and their operation was confined to one 300 square foot shed. They sold only the finished cartridges, but not the remanufacturing components offered by plaintiff.

On 12 January 2000, plaintiff wrote to defendant stating that it considered defendant's remanufacture business to be in "direct competition" with plaintiff, and to constitute "a violation of the December 8th agreement." The letter asked defendant to reaffirm his intention to honor the agreement. Defendant replied through counsel that he would "honor the terms of his agreement with [plaintiff] to the extent that the agreement is enforceable." Plaintiff wrote defendant again, asking "whether it is [defendant's] position that the . . . [agreement] is unenforceable, and whether he will abide by [plaintiff's] interpretation of the agreement[.]" Defendant did not respond to this letter.

On 6 March 2000, plaintiff filed suit against defendant, claiming unlawful misappropriation of trade secrets and breach of contract. The complaint sought compensatory and punitive damages and injunctive relief. Plaintiff alleged that defendant had "already begun to disclose [plaintiff's] trade secrets to others," and had "willfully and maliciously misappropriated, misused and/or disclosed [plaintiff's] technical and business trade secrets[.]" The complaint also alleged that defendant's remanufacture business violated the non-compete agreement and was "in competition with [plaintiff.]" The same day that the complaint was filed, plaintiff obtained an *ex parte* temporary restraining order which prohibited defendant from misappropriating or disseminating plaintiff's trade secrets. On 10 April 2000, plaintiff obtained a preliminary injunction that generally enjoined defendant from revealing plaintiff's non-public information, but expressly permitted defendant to continue remanufacturing cartridges, without prejudice to either party to argue the issue at trial.

In April, 2000, defendant deposed William J. Gander, plaintiff's operations manager. Gander testified that plaintiff did not sell remanufactured cartridges, but planned to sell them at some future date, although he acknowledged that this would put plaintiff in direct competition with its customers. In June, 2000, however, in response to customer concerns, plaintiff's website posted a notice stating that they were not planning to make remanufactured toner cartridges. Gander also testified that to the best of his knowledge, defendant had not disclosed any of plaintiff's trade secrets.

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On 15 December, 2000, defendant deposed Edwin Swartz, plaintiff's president and CEO. Swartz testified that, although the possibility of plaintiff's selling remanufactured cartridges had been "discuss[ed]" from time to time," plaintiff had "no plans to remanufacture toner cartridges." He acknowledged that defendant was not competing with plaintiff, had not disclosed any trade secrets, and admitted that he had refused to sell components to defendant.

On 19 December 2000, four days after Swartz's deposition, plaintiff voluntarily dismissed its lawsuit, pursuant to N.C.G.S. § 1A-1, Rule 41(b). On 9 January 2001, defendant, through counsel, wrote to plaintiff, seeking a settlement of the matter. Defendant stated that the lawsuit had "no basis in fact"; that plaintiff had not "been able to offer any evidence of any . . . disclosure of trade secrets and . . . no evidence of any competition by [defendant]; and that "this lawsuit was simply a vindictive act." Defendant informed plaintiff that he believed defendant was entitled to sanctions under N.C.G.S. § 1A-1, Rule 11. He expressed a willingness to (1) accept a cash settlement "to compensate [defendant] for the expense and trouble" of "defending this frivolous law action[.]" and to (2) execute an agreement not to disclose plaintiff's pricing practices or suppliers. Plaintiff did not respond to defendant's settlement offer, and on 25 April 2001, defendant filed a motion for Rule 11 sanctions against defendant. The motion was heard in May, 2001, and the trial court entered an order 31 May 2001, concluding that "the verified pleading filed by [plaintiff] in this action was not based upon a reasonable inquiry and was not well grounded in fact[, and] . . . was filed for the improper purpose of harassing the defendant[.]" The trial court awarded defendant \$5918.00 in sanctions, the amount of his documented expenses in the case. Plaintiff appeals from this order.

N.C.G.S. § 1A-1, Rule 11 (2001) provides in pertinent part:

. . . Every pleading . . . shall be signed by at least one attorney of record . . . [which] constitutes a certificate by him that he has read the pleading, . . . [and] that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law . . . and that it is not interposed for any improper purpose[.] . . . If a pleading . . . is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction. . . .

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N.C.G.S. § 1A-1, Rule 11(a). “There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose. . . . A violation of any one of these requirements mandates the imposition of sanctions under Rule 11.” *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365, (citing *Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992)), *disc. review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994). On appeal, the trial court’s decision whether to impose sanctions for a violation of Rule 11 is “reviewable *de novo* as a legal issue.” *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989), *disc. review denied*, 329 N.C. 505, 407 S.E.2d 552 (1991). If this Court determines that (1) the trial court’s findings of fact are supported by sufficient evidence; (2) these findings support the court’s conclusions of law; and (3) the conclusions of law support the judgment, it “must uphold the trial court’s decision to impose or deny the imposition of mandatory sanctions[.]” *Polygenex Intern., Inc. v. Polyzen, Inc.*, 133 N.C. App. 245, 249, 515 S.E.2d 457, 460 (1999).

The trial court’s findings of fact are conclusive on appeal if supported by competent evidence, even when the record includes other evidence that might support contrary findings. *Institution Food House v. Circus Hall of Cream*, 107 N.C. App. 552, 556, 421 S.E.2d 370, 372 (1992). Further, findings of fact to which plaintiff has not assigned error and argued in his brief are conclusively established on appeal. *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998).

In the instant case, although plaintiff assigned error to findings of fact numbers 13, 22, 23, 25, and 28, because defendant does not argue in his brief “that these findings of fact are not supported by . . . evidence in the record, this Court is bound by the trial court’s findings of fact.” *In re Pope*, 144 N.C. App. 32, 36 n.3, 547 S.E.2d 153, 156 n.3, *aff’d*, 354 N.C. 359, 554 S.E.2d 644 (2001).

I.

[1] Plaintiff argues first that the trial court erred by concluding that the verified complaint filed in this action was not well grounded in fact, or based upon a reasonable inquiry. We disagree.

Analysis of the factual sufficiency of a complaint requires the court to determine “(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well

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grounded in fact.” *Page v. Roscoe, LLC*, 128 N.C. App. 678, 681-82, 497 S.E.2d 422, 425 (1998). An inquiry is reasonable if “given the knowledge and information which can be imputed to a party, a reasonable person under the same or similar circumstances would have terminated his or her inquiry and formed the belief that the claim was warranted under existing law[.]” *Bryson v. Sullivan*, 330 N.C. 644, 661-62, 412 S.E.2d 327, 336 (1992).

The order entered in the case *sub judice* included the following pertinent findings of fact:

...

13. The Complaint is not phrased in terms of [plaintiff] admitting that it had no evidence or information that [defendant] had misappropriated any trade secrets or had competed with it or that it merely had a reasonable apprehension of irreparable loss, but rather makes affirmative declarations that [defendant] was competing with it and was misappropriating its trade secrets. . . . In fact the only inquiry made by [plaintiff] as revealed by the record in this action are the letters between [counsel for the parties].

....

15. On December 15, 2000, Defendant deposed the CEO of [plaintiff], Mr. Edwin Swartz. Mr. Swartz is a hands on manager who stays abreast of all development in these companies. He is the founder of these companies. Mr. Swartz testified in part as follows. . . .

Finding of fact number 15 also includes several pages of excerpts from Swartz’s deposition, indicating that plaintiff (1) did not plan to enter the toner cartridge remanufacture business, and (2) had no evidence that defendant had disclosed trade secrets, competed with plaintiff, or failed to honor the agreement. These findings, which are fully supported by the record, are conclusive on appeal.

Notwithstanding these findings, plaintiff contends that defendant’s letter stating that he would honor the agreement “to the extent it was legally enforceable” entitled them to conclude that defendant’s “disclosure of [plaintiff’s] trade secrets and competition with plaintiff was imminent[.]” We find nothing in defendant’s letter to suggest that his disclosure of plaintiff’s trade secrets was “imminent.” Moreover, the complaint does not allege potential or future disclosure of trade secrets, but “makes affirmative declarations that [defendant] was competing with it and was misappropriating its trade secrets.”

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Plaintiffs also argue that Gander's testimony, that plaintiff planned to sell remanufactured cartridges in the future, establishes a factual basis for the complaint. However, contradictory testimony from Swartz, that plaintiff had no plans to sell remanufactured cartridges, fully supports the trial court's finding that the complaint was not well grounded in fact. We find unavailing plaintiff's attempts to distinguish between Swartz's knowledge and that of plaintiff, given that he is plaintiff's CEO. We are likewise unpersuaded by plaintiff's suggestion, that at the time the complaint was drafted it planned to remanufacture cartridges in the future, and only later decided against it. As found by the trial court, the complaint alleged then-existing direct competition, and ongoing misappropriation and disclosure of trade secrets; both of these allegations were directly contradicted by the deposition testimony of Gander and Swartz.

We conclude that the trial court's findings of fact were supported by the evidence, and support the court's conclusion that the complaint was "not well grounded in fact" and "not formed after a reasonable inquiry." This assignment of error is overruled.

II.

[2] Plaintiff next argues that the trial court erred by concluding that the complaint was filed for an improper purpose. We disagree.

"The improper purpose prong of Rule 11 is separate and distinct from the factual and legal sufficiency requirements." *Bryson v. Sullivan*, 330 N.C. 644, 663, 412 S.E.2d 327, 337 (1992). Thus, "[e]ven if the complaint is well grounded in fact and in law, it may nonetheless violate the improper purpose prong of Rule 11." *McClerin v. R-M Industries, Inc.*, 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995). "[T]he relevant inquiry is whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior[. . . and an] improper purpose is any purpose other than one to vindicate rights . . . or to put claims of right to a proper test." *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992) (citation omitted).

In the case *sub judice*, the trial court concluded that the complaint was filed "for the improper purpose of harassing the Defendant[.]" We hold that this conclusion was amply supported by the court's findings of fact, and by the evidence upon which they were based.

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Swartz testified that “what this case is all about” was that plaintiff was “dissatisfied with [defendant’s] replies” to their letters. Swartz admitted that defendant had not violated the agreement, as was alleged in the complaint, and that there was no evidence that defendant was unwilling to abide by the agreement. Nonetheless, Swartz considered defendant’s promise to honor the agreement “to the extent it is enforceable” to be “hedging,” and demanded that defendant expressly state “Yes, I will live up to that agreement.” Swartz testified that as soon as defendant wrote a letter that Swartz found satisfactory, he would instruct his attorney to drop the suit:

If Mr. Vogler will say unqualified “I will abide by the agreement in this case,” [defendant] won’t have to pay you [defendant’s attorney] any more money and . . . we’ll stop all this foolishness. All you have to do is say that “I will abide by that agreement” and this case is over.

We conclude that Swartz’s testimony establishes that the purpose of the lawsuit was not to redress injury by defendant, but to extract from defendant another letter promising to uphold the agreement. This is an “improper purpose” which supports the trial court’s imposition of sanctions.

Plaintiff also asserts error in the trial court’s finding of fact number 23, in which the trial court summarized certain testimony by Huffman, indicating that Swartz disliked defendant, and that Swartz believed in intimidation of employees and in punishing competitors. Plaintiff argues that Huffman’s testimony was inadmissible under North Carolina Rules of Evidence 404(a), and should not have been considered by the court in its analysis of improper purpose. The defendant, on the other hand, contends it was admissible under Rule 404(b) to show Swartz’s intent, motive, and plan. We find, however, that even assuming, *arguendo*, that the testimony was inadmissible, that the trial court’s other findings of fact independently support its conclusion that the complaint was filed for a purpose “other than one to vindicate rights . . . or to put claims of right to a proper test.” This assignment of error is overruled.

III.

[3] Plaintiff argues next that the trial court’s imposition of Rule 11 sanctions was inappropriate, given that plaintiff had obtained a preliminary injunction and had survived defendant’s summary judgment motion.

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Plaintiff urges this Court to adopt the “bright line rule” discussed in *Pugh v. Pugh*, 111 N.C. App. 118, 126, 431 S.E.2d 873, 878 (1993), and to hold that whenever a party “survives a motion for summary judgment, the allegations presented in the Complaint are necessarily well-grounded in fact and not a proper basis for imposing Rule 11 sanctions.” In *Pugh*, this Court did not adopt the above test, but simply acknowledged that it represented one “school of thought.” In other opinions issued since then, this Court has expressly declined to adopt the rule discussed in *Pugh*. See *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 660, 464 S.E.2d 47, 55-56 (1995) (denial of summary judgment motion no bar to Rule 11 sanctions, because a “claim may appear to raise legitimate and genuine issues before trial” but later “be unmasked as not well-founded in fact[.]”) (citation omitted). We decline to adopt the rule, urged by plaintiff, barring Rule 11 challenges to any case that has survived a summary judgment motion. This assignment of error is overruled.

IV.

[4] Lastly, plaintiff argues that the trial court erred by concluding that defendant moved for Rule 11 sanctions in a timely fashion.

Although Rule 11 does not “contain[] explicit time limits for filing Rule 11 sanctions motions[,]” case law establishes that “a party should make a Rule 11 motion within a reasonable time after he discovers an alleged impropriety.” *Renner v. Hawk*, 125 N.C. App. 483, 491, 481 S.E.2d 370, 374, *disc. review denied*, 346 N.C. 283, 487 S.E.2d 553 (1997) (citation omitted).

The question of whether a Rule 11 motion was filed “within a reasonable time” is reviewable *de novo*, “under an objective standard.” *Griffin v. Sweet*, 136 N.C. App. 762, 765, 525 S.E.2d 504, 506-07 (2000). In *Griffin*, this Court held that a Rule 11 motion was untimely where the movant delayed filing for thirteen months after the North Carolina Supreme Court had denied defendant’s petition for discretionary review, and there was no activity in the case in the interim. On the other hand, in *Renner*, this Court upheld the filing of a Rule 11 motion more than six months after the action was filed, noting that “the alleged impropriety became apparent . . . only during the course of discovery.”

We conclude that the instant case is similar to *Renner*, in that the impropriety of plaintiff’s claims only came into focus during discovery. In its order, the trial court found that the letter of 9 January was:

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a reasonable attempt by the Defendant to try to voluntarily resolve the issues arising out of this action having been filed by [plaintiff]. [Plaintiff] never responded to this letter to attempt to resolve this or to explain why it had filed the law suit. After waiting a decent interval of time, the Defendant filed this Motion on April 25, 2001. It is the opinion of this Court that the Defendant did in fact timely file his Rule 11 Motion.

We conclude that the record supports the trial court's finding and conclusion. The record indicates that, although defendant contended from the start that the suit was baseless, it was the depositions of Gander and Swartz which unequivocally exposed the absence of any factual basis for the allegations in the complaint. On 19 December 2000, within a week of defendant's deposing plaintiff's CEO, plaintiff dismissed this action. Thereafter, defendant promptly sought a settlement, writing to plaintiff on 9 January 2001, to propose certain terms. When plaintiff failed to respond after three months, defendant filed the motion for Rule 11 sanctions. We conclude that this evidence supports the trial court's findings and conclusion. This assignment of error is overruled.

For the reasons discussed above, we find no error in the trial court's award of sanctions under Rule 11. Accordingly, the trial court's order is

Affirmed.

Judges GREENE and HUDSON concur.



STATE OF NORTH CAROLINA v. DARRELL LOVE

No. COA01-1275

(Filed 3 September 2002)

1. Evidence— sexual abuse on female minor victim's mother nearly twenty years before—proof of identity, common scheme, plan, modus operandi, and intent—remoteness

The trial court did not err in a first-degree sexual offense and first-degree kidnapping of a female minor case by admitting evidence of alleged sexual abuse by defendant on the female minor

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victim's mother nearly twenty years before the present charge, when the mother was nine years old, because: (1) the evidence was admissible under N.C.G.S. § 8C-1, Rule 404(b) to show proof of identity, a common scheme or plan or modus operandi, and intent; (2) defendant has waived any objection he may have previously raised as to its admissibility when this evidence was later admitted by an officer without objection; (3) even assuming *arguendo* that defendant did not waive his objection, the evidence presented at trial was substantial, and the female minor's testimony was corroborated in part by her mother, siblings, and cousins; (4) North Carolina courts have permitted testimony of prior acts of sexual misconduct which occurred greater than seven to twelve years even though defendant contends the acts against the female minor's mother were too remote; and (5) the probative value of the testimony about defendant's earlier sexual misconduct was admissible and the record fails to show evidence reflecting that the trial court abused its discretion in determining that the probative value outweighed the prejudicial effect.

2. Evidence—corroboration—officer's testimony—statement from female minor victim's mother

The trial court did not commit plain error in a first-degree sexual offense and first-degree kidnapping of a female minor case by admitting an officer's testimony concerning a statement he took from the female minor victim's mother that twenty years earlier defendant would give her candy and dollars in return for sexual acts and that defendant continued to proposition her, because: (1) a witness's prior consistent statements are admissible to corroborate the witness's sworn trial testimony; and (2) the variations in the mother's testimony at trial do not directly contradict her statement given to the officer, but instead the information in the statement was substantially similar to and tended to strengthen and confirm her testimony at trial regarding the alleged sexual abuse.

3. Criminal Law—jury instruction—definition of corroboration

The trial court did not err in a first-degree sexual offense and first-degree kidnapping of a female minor case by allegedly failing to properly define corroboration in a jury instruction regarding a statement of the female minor's mother to an officer, because: (1) the failure of a trial court to define corroboration in

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a jury instruction is not error; and (2) defendant did not object to this instruction, nor did he request an additional instruction.

4. Discovery— late revelation—failure to disclose defendant's statements

The trial court did not abuse its discretion in a first-degree sexual offense and first-degree kidnapping of a female minor case by overruling defendant's objections to the admission of statements he made that were allegedly not provided to him through discovery, because: (1) the State learned about one of the statements the day before trial, the trial court found the statement was a similar and related descriptive phrase, and there is no showing that this late revelation upset defendant's overall strategy or that he was otherwise prejudiced by the late discovery; and (2) where trial testimony is substantially similar to what in substance was provided during discovery and variations are attributable to the addition or elaboration of detail or merely changes in vocabulary or syntax, the testimony is admissible and in full compliance with our discovery rules.

5. Indictment and Information— short-form—first-degree sexual offense

The trial court did not err by finding an indictment for first-degree sexual offense to be constitutionally valid, because the indictment complied with N.C.G.S. § 15-144.2 which authorizes a short-form indictment for the crime of first-degree sexual offense.

Appeal by defendant from judgment entered 8 March 2001 by Judge W. Erwin Spainhour in Superior Court, Rowan County. Heard in the Court of Appeals 14 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Diane G. Miller, for the State.

Rudolf, Maher, Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for the defendant-appellant.

WYNN, Judge.

Following his convictions for first degree sexual offense and first degree kidnapping of a female minor, the defendant brings the following issues on appeal of whether the trial court erred by (I) admitting evidence of an alleged sexual act by defendant on the female

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minor's mother nearly twenty years before the present charge, (II) admitting an officer's testimony concerning a statement he took from the female minor's mother, (III) giving a jury instruction on corroboration regarding the female minor's mother's statement to the officer; (IV) overruling defendant's objections to the admission of statements he made that were not provided to him through discovery, and (V) finding the indictment for first degree sexual offense constitutionally valid. For the reasons stated below, we find no error in his trial.

The State's evidence tended to show that on the evening of 15 July 1999, a six-year-old child was playing outdoors with her brother, two sisters and two cousins. Defendant was nearby and asked the female minor to help him find his dog's collar. After searching for the collar, defendant told the female minor to come and clean his house and told the other children to go home.

Defendant grabbed the female minor's arm and took her into his house. Once inside, defendant pulled down the female minor's pants and panties and performed oral sex on her. Defendant told her not to tell her mother what had happened. Afterwards, the female minor unlocked the door and started walking home, holding a dollar bill that defendant gave her.

In the meantime, the other children went to the female minor's home and told her mother that the female minor was with defendant. As the female minor's mother started walking towards defendant's house, she saw her daughter whom she asked if defendant did anything to her. Initially, the female minor answered no, and stated that defendant wanted her to clean his house. Later, however, the female minor told her mother what defendant did to her; consequently, her mother contacted the police. Following conviction by a jury, the trial court imposed a sentence of 230 months to 285 months for the first degree sexual offense conviction and arrested judgment on the first degree kidnapping conviction.

[1] On appeal, defendant first contends that the trial court committed reversible error by admitting irrelevant and inflammatory evidence of an alleged sexual act by him on the female minor's mother nearly twenty years before the present charge. We disagree.

Under Rule 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other

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purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2001). Thus, Rule 404(b) allows admission of conduct evidence so long as it is offered for a purpose other than to show that defendant had the propensity to engage in the charged conduct. *See State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986). Moreover, if specific acts are relevant and competent as evidence of something other than character, they are not inadmissible because they incidentally reflect upon character. *See State v. Penley*, 6 N.C. App. 455, 466, 170 S.E.2d 632, 639 (1969).

When the evidence is offered for a proper purpose, the ultimate test of admissibility is whether the incidents are sufficiently similar to those in the case at bar and not so remote in time as to be more prejudicial than probative under the Rule 403 test. *See State v. Cotton*, 318 N.C. 663, 665, 351 S.E.2d 277, 279 (1987). The similarities between the acts do not have to be unique or bizarre; rather, they must tend to support a reasonable inference that the same person committed both acts. *See State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991). Remoteness in time generally affects the weight to be given to the evidence, but not its admissibility. *See id.* at 307, 406 S.E.2d at 893. Further, remoteness in time is less important when the prior act is used to show intent, motive, knowledge, or lack of mistake. *See State v. White*, 349 N.C. 535, 553, 508 S.E.2d 253, 265 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). "With respect to prior sexual offenses, we have been very liberal in permitting the State to present such evidence to prove any relevant fact not prohibited by Rule 404(b)." *State v. White*, 331 N.C. 604, 612, 419 S.E.2d 557, 561 (1992).

In the present case, the trial court conducted a *voir dire* hearing, to determine the admissibility of the testimony of the female minor's mother concerning alleged sexual abuse by defendant. After *voir dire*, the trial court concluded in a written order that the testimony of the female minor's mother was admissible to show the identity of the man who abused her on 15 July 1999, common scheme or plan, or *modus operandi*, intent on the part of defendant in that he intentionally abused the female minor. The trial court further concluded the testimony was admissible under Rules 403 and 404(b) of the North Carolina Rules of Evidence.

At trial, the mother of the female minor testified, on direct examination over defendant's objection, that when she was about nine

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years old defendant engaged in sexual acts with her on three or four occasions. She also testified that defendant told her not to tell anyone about the occurrences and that she was scared. The trial court allowed into evidence this testimony to show proof of identity, a common scheme or plan or modus operandi, and intent.

Later in the trial, Lieutenant John Sifford testified and described his interview with the female minor's mother on 17 July 1999. During the interview, she told the officer what defendant did to her when she was a child. The officer took a detailed statement from her and read the statement to the jury without objection. Because this evidence was later admitted by Lieutenant Sifford without objection, defendant has waived any objection he may have previously raised as to its admissibility. *See State v. Hunt*, 325 N.C. 187, 196, 381 S.E.2d 453, 459 (1989) (benefit of objection lost when same or similar evidence has been admitted or is later admitted without objection); *State v. Moses*, 316 N.C. 356, 362, 341 S.E.2d 551, 555 (1986) (benefit of defendant's objection to introduction of letter lost when defendant later read from letter).

Even assuming *arguendo* that defendant did not waive his objection, the trial court did not err in allowing the testimony of the female minor's mother. The evidence presented at trial was substantial, the female minor's testimony was corroborated in part by her mother, siblings, and cousins.

Nonetheless, defendant contends that the acts against the female minor's mother were too remote; he relies on *State v. Jones*, 322 N.C. 585, 369 S.E.2d 822 (1988), where our Supreme Court found that a span of seven to twelve years renders a prior sexual act too remote. However, since *Jones*, our Courts have permitted testimony of prior acts of sexual misconduct which occurred greater than seven to twelve years earlier. *See State v. Frazier*, 344 N.C. 611, 616, 476 S.E.2d 297, 300 (1996) (testimony showed that defendant's prior acts of sexual abuse occurred over a period of approximately twenty six years); *State v. Penland*, 343 N.C. 634, 654, 472 S.E.2d 734, 745 (1996) (a ten-year gap between instances of similar sexual misbehavior did not render them so remote in time as to negate the existence of a common plan or scheme); *State v. Shamsid-Deen*, 324 N.C. 437, 379 S.E.2d 842 (1989) (sexual misconduct occurred during a twenty-year period).

In *Frazier*, the testimony in question tended to prove that the defendant's prior acts of sexual abuse occurred over a period of approximately twenty-six years and in a strikingly similar pattern. In

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the present case, the testimony of the minor female's mother also indicated a strikingly similar pattern of sexual abuse acts by defendant. Both mother and daughter were young children, in each instance, defendant made the victim sit on his face and licked the child's genitalia, and both victims were related to defendant. Moreover, the trial court made the findings in its order that this was similar to the incident involving the child.

Defendant further argues that the evidence at issue does not show that his alleged bad acts constituted a continuous pattern which our courts require. However, in considering the question of a continuous pattern, "[w]hen there is a period of time during which there is no evidence of sexual abuse, the lapse does not require exclusion of the evidence if the defendant did not have access to the victims during the lapse." *State v. Frazier*, 121 N.C. App. 1, 11, 464 S.E.2d 490, 495 (1995), *decision affirmed*, 344 N.C. 611, 476 S.E.2d 297 (1996). Moreover, our Court has found evidence of other crimes committed in an unusual and similar manner admissible. *See State v. Wortham*, 80 N.C. App. 54, 62, 341 S.E.2d 76, 81 (1986), *reversed in part on other grounds*, 318 N.C. 669, 351 S.E.2d 294 (1987); *see also State v. Riddick*, 316 N.C. 127, 134, 340 S.E.2d 422, 427 (1986) (remoteness in time less important when *modus operandi* so strikingly similar); *State v. Lloyd*, 354 N.C. 76, 89, 552 S.E.2d 596, 609 (2001) (similar evidence properly admitted to show lack of accident); *State v. Penland*, 342 N.C. 634, 654, 472 S.E.2d 2d 734, 745 (1996), *cert. denied*, 519 U.S. 1098, 136 L. Ed. 2d 725 (1996) (ten-year gap between incidents not too long given distinct and bizarre behaviors that suggest ongoing plan). The record in this case shows that the alleged sexual acts that occurred to the minor female and her mother although separated by a long period were strikingly similar.

Defendant also argues that the evidence should have been excluded under Rule 403 which provides,

relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C. Gen. Stat. § 8C-1, Rule 403 (2001).

However, a trial court's decision to admit evidence under Rule 403 will not be grounds for relief on appeal unless it is "manifestly

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unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision.” *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, cert. denied, 510 U.S. 948, 126 L. Ed.2d 341 (1993). Moreover, to show prejudice arising from an evidentiary ruling under Rule 403, “defendant must persuade this Court that had the trial court not admitted the [evidence], a different outcome likely would have been reached.” *State v. Mann*, 355 N.C. 294, 306, 560 S.E.2d 776, 784 (2002) (citing N.C. Gen. Stat. § 15A-1443(a) (1999)); *See State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986).

In the present case, the probative value of the testimony about defendant’s earlier sexual misconduct was admissible and the record fails to show evidence reflecting that the trial court abused its discretion in determining that the probative value outweighed the prejudicial effect. Thus, this assignment of error is rejected.

[2] Next, defendant contends that he is entitled to a new trial because of the erroneous and prejudicial admission of a non-corroborative hearsay statement of the mother. We disagree.

As we stated previously, defendant did not object to the trial court allowing Lieutenant Sifford to read into the record a statement he took from the female minor’s mother concerning the alleged sexual abuse by defendant. After the officer testified, the trial court *sua sponte* instructed the jury that the officer’s statement was admitted to corroborate the mother’s testimony.

Defendant failed to object and waived his right to challenge the introduction of this evidence. Since there was no objection to the introduction of this evidence, defendant must establish plain error by showing that it was a “fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.” *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), cert. denied, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982); *see also State v. Dale*, 343 N.C. 71, 468 S.E.2d 39 (1996). Before granting relief based on the plain error rule, “the appellate court must be convinced absent the error the jury probably would have reached a different verdict.” *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

“It is well-settled that a witness’ prior consistent statements are admissible to corroborate the witness’ sworn trial testimony.” *State v. McGraw*, 137 N.C. App. 726, 730, 529 S.E.2d 493, 497 (2000). “Corroborative evidence by definition tends to ‘strengthen, confirm, or make more certain the testimony of another witness.’” *Id.* (quot-

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ing *State v. Adams*, 331 N.C. 317, 328-29, 416 S.E.2d 380, 386 (1992). "Slight variances or inconsistencies in and between the corroborative testimony and that sought to be corroborated, however, do not render the corroborative testimony inadmissible." *State v. Burns*, 307 N.C. 224, 230, 297 S.E.2d 384, 387 (1982). Corroborative testimony may contain additional information when it strengthens or adds credibility to the testimony in which it corroborates but it may not contradict trial testimony. See *id.*

Defendant specifically argues that Lieutenant Sifford's statement was erroneously admitted because it contained new material that was grossly prejudicial to him and did not add weight or credibility to the testimony of the mother. He specifically objects to the parts of the statement where she told the officer that defendant "would give me candy and dollars in return," that "one of the incidents occurred in the woods," that defendant "did proposition me many times to let him do this to me again," and that defendant "still continued to proposition me about this and did so about two months ago." "In the ordinary course of things, an individual will not describe the same event in precisely the same way on any two occasions. Nor is it necessary that a person do so in order that his prior consistent statements be admissible to corroborate his testimony at trial." *State v. Burns*, 307 N.C. at 230, 297 S.E.2d at 387.

In the present case, the variations in the mother's testimony at trial do not directly contradict her statement given to Lieutenant Sifford; rather, the information in the statement was "substantially similar to and tended to strengthen and confirm" her testimony at trial regarding the alleged sexual abuse. *State v. McCord*, 140 N.C. App. 634, 657, 538 S.E.2d 633, 647 (2000) (citations omitted), *review denied*, 353 N.C. 392, 547 S.E.2d 33 (2001). Accordingly, we reject this assignment of error.

[3] Next, defendant contends that the trial court did not properly define corroboration for the jury and that the trial court should have instructed the jury pursuant to N.C.P.I. - Crim. 105.20, the pattern jury instruction for corroboration. We disagree.

The trial court instructed the jury as follows:

Ladies and gentlemen, the evidence you just heard, that is a statement that the lieutenant just talked about before, it was offered for the purpose of corroborating the testimony of [the female minor's mother] and for no other purpose.

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The failure of the trial court to define corroboration in a jury instruction is not error. *See State v. Lee*, 248 N.C. 327, 328, 103 S.E.2d 295, 296 (1958); *State v. Hill*, 32 N.C. App. 261, 231 S.E.2d 682, 684 (1977); *State v. Satterfield*, 27 N.C. App. 270, 218 S.E.2d 504 (1975). For example, our Supreme Court held that a trial court's instruction that stated "if you find that this statement does corroborate his/her testimony," to be sufficient. *State v. Alston*, 307 N.C. 321, 332, 298 S.E.2d 631, 640 (1983) (citing *State v. Detter*, 298 N.C. 604, 630, 260 S.E.2d 567, 585 (1979); *See also State v. Case*, 253 N.C. 130, 136, 116 S.E.2d 429, 433 (1960), *cert. denied*, 365 U.S. 830, 81 S. Ct. 717, 5 L. Ed.2d 707 (1961)). We find this instruction similar to the instruction given in the present case. Moreover, the record shows that defendant did not object to this instruction, nor did he request an additional instruction. "The admission of evidence which is competent for a restricted purpose without limiting instructions will not be held to be error in the absence of a request by the defendant for such limiting instructions." *State v. Coffey*, 326 N.C. 268, 286, 389 S.E.2d 48, 59 (1990). Therefore, this assignment of error is rejected.

[4] Next, defendant contends that the trial court erred in overruling his objections to the admission of three statements that were not provided to him through discovery. We disagree.

Defendant specifically argues that admitting these statements was a discovery violation under N.C. Gen. Stat. § 15A-903. N.C. Gen. Stat. § 15A-903(a)(2) (2001) which requires a prosecutor to disclose to a defendant the substance of any relevant statements made by the defendant, in possession of the State, and the existence of which is known to the prosecutor. However, a trial court is not required to impose sanctions for late discovery; instead, it is a matter of discretion for the trial judge. *See* N.C. Gen. Stat. § 15A-910 (2001); *State v. Weeks*, 322 N.C. 152, 171, 367 S.E.2d 895, 906 (1988); *State v. Gardner*, 311 N.C. 489, 506, 319 S.E.2d 591, 603 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985).

In the present case, defendant objected to the testimony of the female minor's cousin who testified that she heard defendant describe the female minor as a "thick juicy plum." Before it was offered, defendant objected to this testimony because it was not provided through discovery. The State responded that it had just learned about the statement the day before the trial, and because defendant had been provided with discovery where he had made similarly sexually suggestive comments about the female minor to her mother, defendant would not be unfairly surprised by the cousin's statement.

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The trial court found that the statement was a similar and related descriptive phrase and overruled defendant's objection. Furthermore, there is no showing that this late revelation upset defendant's overall strategy or that he was otherwise prejudiced by the late discovery.

Defendant also argues in his brief that a statement made by the female minor's mother was a discovery violation and constituted error. At trial, the mother stated that defendant told her, "Your daughter got those big thighs like you do. You know she's real thick and got those big thighs like you did when you were little." Defendant made an objection. However, the trial court pointed out that "there were other similar and related descriptive phrases. I'll overrule the objection at this time." Defendant also made an objection to a statement made by the female minor's aunt, who testified that she heard defendant say to other females, "just sit on my head, make my head feel good."

"Where, as in the present case, trial testimony is *substantially similar* to what in substance was provided during discovery, and variations are attributable to the addition or elaboration of detail or merely changes in vocabulary or syntax, the testimony is admissible, and in full compliance with our discovery rules." *State v. Pridgen*, 313 N.C. 80, 91, 326 S.E.2d 618, 625 (1985).

The record on appeal shows that as to the statement by the female minor's cousin, the trial court made a determination that the statement was similar to other statements; and as to the other two statements, we cannot find that the objection to these statements was grounded on a discovery violation, or that defendant was not provided with this information through discovery. "This Court has held that discretionary rulings of the trial court will not be disturbed on the issue of failure to make discovery absent a showing of bad faith by the state in its noncompliance with the discovery requirements." *State v. McClintick*, 315 N.C. 649, 662, 340 S.E.2d 41, 49 (1986). Therefore, this assignment of error is rejected.

[5] In his final argument, defendant contends that the indictment for first degree sexual offense was not constitutionally valid because it failed to allege one of the elements of the offense in light of *Apprendi v. New Jersey*. We disagree.

Both our legislature and our courts have endorsed the use of short-form indictments for rape and sex offenses, even though such indictments do not specifically allege each and every ele-

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ment. N.C. Gen. Stat. § 15-144.1 (1999) (outlining requirements for rape indictment); N.C. Gen. Stat. § 15-144.2(a) (outlining requirements for sex offense indictment); *State v. Edwards*, 305 N.C. 378, 380, 289 S.E.2d 360, 362 (1982) (upholding short-form indictments for sex offenses); *State v. Lowe*, 295 N.C. 596, 604, 247 S.E.2d 878, 883-84 (1978) (upholding short-form indictments for rape).

State v. Harris, 140 N.C. App. 208, 215, 535 S.E.2d 614, 619, *review denied*, 353 N.C. 271, 546 S.E.2d 122 (2000). The indictment in this case complied with N.C. Gen. Stat. § 15-144.2 (2001) which authorizes a short-form indictment for the crime of first-degree sexual offense, and thus, the trial court had subject matter jurisdiction over defendant. *See State v. Wallace*, 351 N.C. 481, 503-06, 528 S.E.2d 326, 342-44, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000); *State v. Doisey*, 138 N.C. App. 620, 628, 532 S.E.2d 240, 246, *review denied*, 352 N.C. 678, 545 S.E.2d 434 (2000), *cert. denied*, 531 U.S. 117, 148 L. Ed. 2d 1015 (2001). Accordingly, we reject this assignment of error.

In summation, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges HUDSON and CAMPBELL concur.

TINA JEANETTE WEBB PHILLIPS, PLAINTIFF-APPELLANT V.
CHARLES FRANKLIN WARREN, DEFENDANT-APPELLEE

No. COA01-572

(Filed 3 September 2002)

1. Costs; Interest— offer of judgment—prejudgment interest—judgment finally obtained

The trial court improperly omitted prejudgment interest on compensatory damages from the time an automobile accident suit was filed until entry of judgment in calculating the judgment finally obtained to determine whether such judgment was larger than defendant's Rule 68 lump sum offer of judgment which was refused by plaintiff and thus whether the offer of judgment tolled the accrual of prejudgment interest as of the date of the offer. In

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calculating the judgment finally obtained in a case where the plaintiff refused a lump sum offer of judgment, both pre- and post-offer prejudgment interest shall be included along with the pre- and post-offer costs, the verdict, and any awarded attorney fees. N.C.G.S. § 1A-1, Rule 68.

2. Costs— Rule 68—post-offer costs—inclusion in judgment

The trial court erred in the calculation of costs in the determination of whether Rule 68 applied by not including post-offer costs in the judgment finally obtained.

3. Costs— Rule 68—amount of final judgment

The judgment finally obtained in a Rule 68 case consists of the verdict, costs, fees, interest, and any other assessed costs such as attorney fees. In this case, the total without attorney fees comes to \$8,448.47 (the verdict of \$6,000, costs of \$1,835.47, and interest which should have been awarded of \$613).

4. Costs— attorney fees—offers of judgment—judgment finally obtained

Plaintiff's motion for attorney fees in an automobile accident case pursuant to N.C.G.S. § 6-21.1 must be remanded for reconsideration where the trial court failed to consider offers of judgment made by defendant and the correct amount of the judgment finally obtained in denying the motion.

Appeal by plaintiff from order entered 20 October 2000 by Judge Donald Jacobs in Johnston County Superior Court. Heard in the Court of Appeals 18 February 2002.

Mast, Schulz, Mast, Mills & Stem, P.A., by Charles D. Mast, for plaintiff appellant.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Jonathan E. Hall, for defendant appellee.

McCULLOUGH, Judge.

Plaintiff Tina Jeanette Webb appeals from an order on costs and attorneys' fees entered 20 October 2000.

On 2 December 1996, plaintiff and defendant were involved in an automobile accident. Efforts by the parties to settle this matter out of court ensued. On 12 February 1999, plaintiff was offered \$6,000 by defendant's insurance carrier. This offer was declined by

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plaintiff. As settlement efforts had failed, plaintiff filed suit on 12 July 1999.

Along with its answer, defendant filed an offer of judgment pursuant to Rule 68(a) on 3 August 1999. This offer was for “the total sum, in the aggregate, including costs now accrued and attorney’s fees, of EIGHT THOUSAND AND NO/100 DOLLARS (\$8,000.00).” Plaintiff declined the offer. As of 3 August 1999, plaintiff had incurred costs of \$176.00 and reasonable attorneys’ fees totaling \$4,181.25.

On 29 December 1999, defendant filed another offer of judgment in the amount of \$11,000.00. Plaintiff also declined this offer. From 3 August 1999 up to 29 December 1999, plaintiff had incurred costs of \$668.16 and reasonable attorneys’ fees of \$4,649.84. During the same period, defendant had incurred costs of \$744.90.

The case went to trial on 28 August 2000. The only issue for the jury were those of proximate cause and damages. The jury returned a verdict in favor of plaintiff in the amount of \$6,000.00 entered on 31 August 2000. According to plaintiff, she had incurred costs of \$991.31 and attorneys’ fees of \$10,351.25 since the second offer of judgment. Defendant had incurred costs of \$835.45 since the second offer of judgment.

The parties brought respective motions as to the costs of the action. Defendant brought a motion for costs pursuant to Rule 68 on 31 August 2000. Plaintiff brought a motion for costs and attorney fees pursuant to N.C. Gen. Stat. § 6-21.1 (2001) on 12 October 2000.

On 20 October 2000, the Honorable Donald Jacobs entered an order on the parties’ motions for costs and attorney fees. This order denied plaintiff’s motion for attorney fees under N.C. Gen. Stat. § 6-21.1, allowed in part and denied in part plaintiff’s motion for costs, and allowed defendant’s motion for costs. Plaintiff appeals from this order.

Plaintiff presents the following questions on appeal: Whether the trial court (1) erred by failing to properly award plaintiff prejudgment interest when it failed to award plaintiff interest for the entire period the action was pending as required by the statute; (2) erred in ordering plaintiff to pay defendant’s costs when the sum of the verdict and applicable adjustments exceeded the first offer of judgment; (3) abused its discretion in denying plaintiff’s request for reasonable attorneys’ fees when its decision was partly based on an error of law and it failed to properly apportion costs between the parties under

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Rule 68(a); and (4) erred in ordering plaintiff to pay defendant's costs incurred after the second offer of judgment.

Plaintiff contends that the trial court erred in its calculation of the "judgment finally obtained" in this case. Specifically, it is contended that the trial court erred by not attributing the full amount of plaintiff's costs and prejudgment interest to the judgment finally obtained for purposes of Rule 68 motions for costs.

THE ORDER

The 20 October 2000 order by Judge Jacobs on costs and attorneys' fees found that the "predominant issue giving rise to this litigation and carrying the case through trial appears to have been whether the Plaintiff's medical care and expenses which she attributes to the accident were in fact reasonable and necessary in light of her injuries" Thus, the entire verdict consisted of compensatory damages, which pursuant to N.C. Gen. Stat. § 24-5(b) (2001) is to bear interest from the date of the action until satisfied. Accordingly, the full verdict amount was used in the trial court's determination of prejudgment interest from 12 July 1999, the date the action had been commenced.

As to the issue of attorneys' fees under N.C. Gen. Stat. § 6-21.1, the trial court made several findings of fact as to the factors set forth in *Washington v. Horton*, 132 N.C. App. 347, 513 S.E.2d 331 (1999):

- (a) That the pre-suit settlement offers made by the insurance carrier for the Defendant, which included an offer of \$6,000 in February, 1999, were reasonable, especially in light of the fact that the ultimate jury verdict was in the exact amount of \$6,000;
- (b) There does not appear to have been any exercise of superior bargaining power on behalf of the Defendant or his insurance carrier;
- (c) There does not appear to have been any unwarranted refusal to settle on the part of Defendant's insurance carrier, again as evidenced by the pre-suit settlement offers made; and
- (d) The settlement offers made by Defendant's insurance carrier came fully five months prior to the institution of suit and nearly a year prior to the expiration of the applicable statute

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of limitations, and therefore Plaintiff had sufficient time to consider said offers before deciding whether to file suit.

As to reasonable attorney fee amounts, the trial court made the following finding of fact:

10. The Court finds that the Plaintiff did incur reasonable attorneys' fees prior to the first Offer of Judgment of August 3, 1999 in the amount of \$4,181.25 and that the Plaintiff incurred reasonable attorneys' fees between the first and second Offers of Judgment in the amount of \$4,649.84. The record before the Court fails to demonstrate what amount of attorneys' fees, if any, Plaintiff had incurred at the time the pre-sut [sic] settlement offer of \$6,000 was made in February, 1999.

However, after reviewing the *Washington* factors, argument of counsel, and the entire record, the trial court, exercising its discretion, denied plaintiff's motion for attorney fees pursuant to N.C. Gen. Stat. § 6-21.1.

As to the issue of costs, the trial court made the following findings of fact:

13. As to Plaintiff's Motion for Costs . . . the Court is of the opinion that Plaintiff is entitled to recover Court costs up to and including the date of Defendant's first Offer of Judgment, which came on August 3, 1999. According to Plaintiff's Affidavit, Plaintiff incurred recoverable costs to that date of \$176. Plaintiff would also be entitled to pre-judgment interest from the date of filing until the Offer of Judgment of August 3, 1999. The Plaintiff is therefore entitled to 22 days' interest on the jury verdict of \$6,000, which is \$29. Total costs recoverable by the Plaintiff, including court costs and interest, are \$205. Plaintiff's remaining costs, which were incurred subsequent to the August 3, 1999 Offer of Judgment, are DENIED. Therefore, in its discretion, the Court hereby ALLOWS Plaintiff's Motion for Costs in part, DENIES Plaintiff's Motion for Costs in part, and enters an ORDER allowing Plaintiff to recover \$205 in costs from the Defendant.

14. As the [sic] Defendant's Motion for Costs pursuant to Rule 68 of the North Carolina Rules of Civil Procedure, having made the above findings, the Court concludes that as of August 3, 1999, the Plaintiff had a case worth \$6,000, as evidenced by the ultimate jury verdict, and had recoverable costs in the amount of

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\$205. The Plaintiff, in the Court's discretion, was not entitled to an award of attorneys' fees to that point. Therefore, the total judgment ultimately obtained by the Plaintiff for the purposes of considering Defendant's Rule 68 Offer of Judgment was the jury verdict plus recoverable costs, for a grand total of \$6,205. Said Judgment ultimately obtained is less than the \$8,000 Offer of Judgment filed by the Defendant on August 3, 1999, and therefore pursuant to Rule 68 the Defendant is entitled to recover its costs incurred subsequent to the Offer of Judgment of August 3, 1999.

15. As evidenced by the Affidavit of Jonathan E. Hall, which is before the Court for its consideration, Defendant incurred a total of \$1,580.35 in costs following the Offer of Judgment of August 3, 1999. The Court hereby finds, in its discretion, that all costs incurred by the Defendant were reasonable and recoverable costs incurred during the course of defending against Plaintiff's claims. The Court therefore, in its discretion, hereby **ALLOWS** Defendant's Motion for Costs pursuant to Rule 68 of the North Carolina Rules of Civil Procedure, in the amount of \$1,580.35.

Thus, plaintiff's recovery was \$4,624.65 (\$6,205.00 less defendant's costs of \$1,580.35).

INTEREST

[1] Plaintiff argues that the trial court erred in assessing prejudgment interest under N.C. Gen. Stat. § 24-5(b) by failing to grant interest for the entire period between the commencement of the suit and the entry of final judgment.

N.C. Gen. Stat. § 24-5(b) states:

In an action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied.

Id. As we said above, we note the entire verdict in this case consisted of compensatory damages.

In *Brown v. Flowe*, our Supreme Court said of § 24-5(b) that "[w]e have held that the probable intent of the prejudgment interest statute, section 24-5, is threefold: (1) to compensate plaintiffs for loss of the use of their money, (2) to prevent unjust enrichment of the defendant by having money he should not have, and (3) to promote settlement." *Brown v. Flowe*, 349 N.C. 520, 524, 507 S.E.2d 894, 896 (1998).

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Plaintiff contends that it is entitled to prejudgment interest of \$613.00 running from 12 July 1999 to 20 October 2000, the date of the trial court's final order. Defendant contends, and the trial court apparently ruled, that their Offer of Judgment, submitted on 3 August 1999, tolled the accrual of prejudgment interest. In support of this argument, defendant cites a line of cases which hold that the accrual of interest is tolled when defendant makes "a 'valid tender of payment for the full amount [of plaintiff's claim], plus interest to date[.]'" *Members Interior Construction v. Leader Construction Co.*, 124 N.C. App. 121, 125, 476 S.E.2d 399, 403 (1996), *disc. review denied*, 345 N.C. 754, 485 S.E.2d 56 (1997) (quoting *Thompson-Arthur Paving Co. v. Lincoln Battleground Assoc.*, 95 N.C. App. 270, 282, 382 S.E.2d 817, 824 (1989)). *See also Webb v. McKeel*, 144 N.C. App. 381, 384, 551 S.E.2d 440, *disc. review denied*, 354 N.C. 371, 557 S.E.2d 537 (2001); *Ingold v. Phoenix Assurance Co.*, 230 N.C. 142, 52 S.E.2d 366 (1949); *Duke v. Pugh*, 218 N.C. 580, 581, 11 S.E.2d 868, 869 (1940). Defendant claims that he made a valid tender of payment for the full amount of the plaintiff's claim, including any accumulated interest, when he filed the 3 August 1999 offer of judgment. Essentially, defendant asks this Court to hold that as a general rule, Rule 68 offers of judgment toll the accrual of prejudgment interest.

A defendant who makes an offer of judgment has three options:

- 1) to specify the amount of the judgment and the amount of costs, 2) to specify the amount of the judgment and leave the amount of costs open to be determined by the court, or 3) to make a lump sum offer which expressly includes both the amount of the judgment and the amount of costs.

Aikens v. Ludlum, 113 N.C. App. 823, 825, 440 S.E.2d 319, 321 (1994). The *Aikens* Court held that such lump sum offers of judgment as in the third option were permissible under North Carolina's Rule 68, "but it is incumbent on the defendant to make sure that he has used language which conveys that he is making a lump sum offer." *Id.* at 826, 440 S.E.2d at 321.

Defendant's offers of judgment provided:

NOW COMES Defendant, through counsel, pursuant to Rule 68(a) of the North Carolina Rules of Civil procedure, and hereby offers to allow judgment be entered against him in this matter in the total sum, in the aggregate, including costs now accrued and attorney's fees, of EIGHT THOUSAND AND NO/100 DOLLARS

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(\$8,000.00). This Offer is made for the purposes set out in Rule 68 of the North Carolina Rules of Civil Procedure and for no other purpose.

TAKE NOTICE that if this Offer is not accepted within ten (10) days after its filing and service, it shall be deemed withdrawn.

This Court has been presented with an offer of judgment similar to the one made by defendant in the present case. As this Court in *Craighead v. Carrols Corp.*, 115 N.C. App. 381, 444 S.E.2d 651 (1994) stated:

In *Harward v. Smith*, this Court held that the defendant's offer of judgment was not ambiguous and provided that the lump sum payment covered the plaintiff's damages, attorney's fees, and costs. The defendant's offer of judgment read:

Defendant, pursuant to G.S. § 1A-1, Rule 68, more than ten days before trial, offers to allow judgment to be taken against her in this action in the lump sum amount of \$7,001.00 for all damages, attorneys' fees taxable as costs, and the remaining costs accrued at the time this offer is filed. This offer is made for the purposes set out in G.S. § 1A-1, Rule 68(a), and for no other purpose.

Harward, 114 N.C. App. at 263-4, 441 S.E.2d at 313.

This Court in *Harward* concluded that "[t]his language evinces an unmistakable intent that the \$7,001.00 lump sum be payment not only for plaintiff's damages, but for her attorney's fees and the costs accrued at the time the Offer of Judgment was filed." *Id.* at 265, 441 S.E.2d at 314. The Court held that the plaintiff was not entitled to any additional attorney's fees or costs of the action such as prejudgment interest. *Id.*

Craighead, 115 N.C. App. at 383, 444 S.E.2d at 652. We find the present offer of judgment to be of the sort discussed in *Harward*. Thus, defendant's offers of judgment were valid lump sum offers under Rule 68.

In *Aikens*, *Harward* and *Craighead*, the plaintiffs had accepted the offer. We now address what effect on prejudgment interest declining a lump sum offer would have.

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Defendant contends that its offer of judgment was a valid tender of payment for the full amount plus interest. This being a lump sum offer, it did evince “an unmistakable intent that the . . . lump sum be payment not only for plaintiff’s damages, but for her attorney’s fees and the costs accrued at the time . . . ,” which according to *Harward*, included prejudgment interest. *Id.* However, in all the cases that defendant relies on, there was a sum certain involved. Most of these cases were contract cases and interest was based on N.C. Gen. Stat. § 24-5(a), or they dealt with actions other than contract based on N.C. Gen. Stat. § 24-5(b), but only after a judgment had been entered and post-judgment interest was involved. It was clearly known whether the amount tendered was for the full amount. (N.C. Gen. Stat. § 1-239 (2001) allows for partial payments—see *Webb*, 144 N.C. App. 381, 551 S.E.2d 440). In the present case, there was no sum certain when the offer was made. The offer of judgment was the full amount defendant was willing to give, but not necessarily what a jury may have believed plaintiff was entitled. This is the nature of actions that are “other than contract,” which are controlled by N.C. Gen. Stat. § 24-5(b).

We believe that prejudgment interest in actions other than contract can be tolled by a lump sum Rule 68 offer of judgment. However, whether the interest was tolled will not be known until a sum certain is available. For purposes of tolling prejudgment interest in actions other than contract, the sum certain to be used for comparison will be the judgment finally obtained, calculated for Rule 68 purposes.

In calculating the judgment finally obtained, prejudgment interest is generally included. See *Brown*, 349 N.C. at 522, 507 S.E.2d at 896. Thus, in calculating the judgment finally obtained in a case where the plaintiff refused a lump sum offer of judgment, the full amount of prejudgment interest, both pre- and post-offer, shall be included along with the pre- and post-offer costs, the verdict, and any awarded attorneys’ fees. See *Roberts v. Swain*, 353 N.C. 246, 250-51, 538 S.E.2d 566, 568-69 (2000). Only if the lump sum Rule 68 motion prevails, the offer being greater than the judgment finally obtained, will the offer of judgment be effective so as to toll further accrual of interest. Thus, plaintiff would only be awarded the verdict, any attorneys’ fees, pre-offer costs and pre-offer interest, rather than the entire amount of interest. As long as a Rule 68 offer of judgment actually offers an amount, which clearly includes interest to date that is greater than the judgment finally obtained by plaintiff, it will toll the accrual of prejudgment interest as of the date of the offer.

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Thus, the \$613.00 should have been included in the trial court's initial calculation of the judgment finally obtained, and it was error for it to not do so. This assignment of error is sustained.

COSTS

[2] Plaintiff contends that the trial court erred in the calculation of costs in its determination of whether Rule 68 applied in its order. Specifically, plaintiff argues that in Finding of Fact 14 the trial court erred by not including plaintiff's post-offer costs in the judgment finally obtained. We agree.

"[T]he North Carolina Supreme Court stated that 'costs incurred after the offer of judgment but prior to the entry of judgment should be included in calculating the "judgment finally obtained[.]"' " *Robinson v. Shue*, 145 N.C. App. 60, 67, 550 S.E.2d 830, 834-35 (2001) (quoting *Roberts*, 353 N.C. at 250-51, 538 S.E.2d at 569). It was error for the trial court not to include the full amount of plaintiff's costs in the judgment finally obtained. Plaintiff submits that this figure is \$1,835.47, as evidenced by the affidavit of George B. Mast and plaintiff's bill of costs, both in the record.

JUDGMENT FINALLY OBTAINED

[3] In light of the determination that the trial court erred in its analysis of Rule 68, we now turn to the issue of whether defendant's offer of judgment was indeed greater than the judgment finally obtained.

Judgment finally obtained consists of the verdict, costs, fees, interest and any other cost assessed to defendant for plaintiff's benefit, such as attorneys' fees. See *Tew v. West*, 143 N.C. App. 534, 538, 546 S.E.2d 183, 186 (2001). The verdict in the present case was \$6,000.00. Total costs for plaintiff presumably amount to \$1,835.47. The trial court awarded \$29.00 of prejudgment interest to plaintiff instead of the full amount of \$613.00. The total at this point comes to \$8,448.47 (\$6,000.00 + \$613.00 + \$1,835.47).

ATTORNEYS' FEES

[4] The trial court denied plaintiff's motion for attorneys' fees, which would have been added to the judgment finally obtained had they been awarded. Plaintiff contends that since the trial court's decision to deny its motion for attorneys' fees under N.C. Gen. Stat. § 6-21.1 was based in part on its miscalculation of prejudgment interest and costs that it should be overturned.

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Generally, attorneys' fees are not recoverable as costs of an action absent statutory authority. *See Hicks v. Albertson*, 284 N.C. 236, 200 S.E.2d 40 (1973). N.C. Gen. Stat. § 6-21.1 authorizes a trial court in its discretion to "allow a reasonable attorney fee" to a successful litigant in a personal injury or property damage suit "where the judgment for recovery of damages is . . . (\$10,000) or less . . . to be taxed as a part of the court costs." N.C. Gen. Stat. § 6-21.1. The purpose of this statute is " 'to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that it is not economically feasible to bring suit on his claim.' " *Robinson*, 145 N.C. App. at 64, 550 S.E.2d at 833 (quoting *Hicks*, 284 N.C. at 239, 200 S.E.2d at 42). "The discretion accorded the trial court in awarding attorney fees pursuant to N.C. Gen. Stat. § 6-21.1 is not unbridled." *Washington*, 132 N.C. App. at 351, 513 S.E.2d at 334 (holding that the court must examine the entire record, including but not limited to: (1) settlement offers made prior to institution of the action; (2) offers of judgment made pursuant to Rule 68 and whether the judgment finally obtained was more favorable than such offers; (3) whether defendant unjustly exercised superior bargaining power; (4) in the case of an unwarranted refusal by an insurance company, the context in which the dispute arose; (5) the timing of settlement offers; and (6) the amounts of settlement offers as compared to the jury verdict. *Id.* at 351, 513 S.E.2d at 334-35).

Plaintiff acknowledges that in order for the trial court's order on attorneys' fees to be overturned an abuse of discretion, arbitrariness, or an error of law must be shown. *Coastal Production v. Goodson Farms*, 70 N.C. App. 221, 226, 319 S.E.2d 650, 655, *disc. review denied*, 312 N.C. 621, 323 S.E.2d 922 (1984). Plaintiff maintains the trial court's error in calculating the judgment finally obtained is sufficient error to require reversal.

The trial court indeed erred in calculating the judgment finally obtained for the reasons set forth above. In addition, according to the findings of fact, the trial court only considered the pre-suit settlement offer made by the insurance carrier. All the findings that the trial court made as to attorneys' fees completely ignore the offers of judgment made and did not take into account the correct amount of the judgment finally obtained.

We then remand this issue to the trial court for a re-determination of the appropriateness of attorneys' fees in light of this opinion. Should attorneys' fees be awarded on remand, the new judgment

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finally obtained should be adjusted to reflect that determination. Only then can the trial court make the final and correct determination as to whether defendant's offers of judgment prevail or fail.

Reversed and remanded.

Chief Judge EAGLES and BIGGS concur.

PRECISION WALLS, INC., PLAINTIFF V. JONATHAN W. SERVIE, DEFENDANT

No. COA01-1120

(Filed 3 September 2002)

1. Appeal and Error— appealability—non-competition agreement—injunction to enforce

A preliminary injunction for plaintiff-employer in an action on a non-competition agreement was immediately appealable where the restriction effectively prohibited defendant from earning a living in North Carolina and South Carolina. A substantial right will be adversely affected if the preliminary injunction escapes immediate review.

2. Employer and Employee— non-competition agreement—injunction to enforce—time of execution

The trial court did not err by granting a preliminary injunction for plaintiff-employer in an action arising from a non-competition agreement where defendant contended that the agreement was not supported by valuable consideration because he signed it after he began work with no additional consideration, but there was evidence that the agreement was entered prior to, and as a condition of, defendant's employment with plaintiff.

3. Employer and Employee— covenant not to compete—not unreasonable

A covenant not to compete was not unreasonable in its time, territory or scope where it prohibited defendant employee from working for a direct competitor of plaintiff in North Carolina and South Carolina for a period of one year.

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4. Injunctions— security—temporary restraining order continued as preliminary injunction

Defendant could not argue on appeal that the trial court erred by not considering whether a bond or security was necessary to protect him when a temporary restraining order was continued as a preliminary injunction. The record was silent as to whether defendant made any argument before the trial court about whether the security given for the temporary restraining order was insufficient.

Appeal by defendant from order entered 20 June 2001 by Judge Narley Cashwell in Wake County Superior Court. Heard in the Court of Appeals 22 May 2002.

Burns, Day & Presnell, P.A., by Daniel C. Higgins, for plaintiff-appellee.

Manning, Fulton & Skinner, P.A., by Judson A. Welborn, for defendant-appellant.

CAMPBELL, Judge.

Jonathan W. Servie (“defendant”) appeals from the trial court’s order granting a preliminary injunction in favor of Precision Walls, Inc. (“plaintiff”). We affirm.

Plaintiff is a North Carolina corporation engaged in the business of manufacturing, selling, and installing interior and exterior wall systems. Plaintiff’s business is headquartered in Raleigh, North Carolina. In addition to its office in Raleigh, plaintiff has offices in Charlotte, Greensboro, and Wilmington, North Carolina, as well as offices in South Carolina and Kentucky. Plaintiff does business in twelve states, including statewide operations in North Carolina and South Carolina. Plaintiff claims to possess various kinds of confidential and proprietary business information, including customer information, such as customer preferences and customer pricing arrangements, information on material and project costs, information on favorable negotiated pricing arrangements with suppliers, information on labor cost factors, profit margin information, and other information related to prices, terms and conditions upon which it bids and competes for work. Plaintiff’s confidential and proprietary business information also includes information related to outstanding bids and proposals on projects for which contracts have yet to be awarded.

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Plaintiff employed defendant on 27 October 1997 as an Estimator/Project Manager. As an Estimator, defendant was responsible for customer contact, calculating job costs and profits, developing accurate, complete and competitive project proposals, and preparing and submitting project bids on behalf of plaintiff. As a Project Manager, defendant was responsible for ordering materials, coordinating material deliveries, scheduling work forces and serving as liaison to the general contractor or owner on assigned projects. As a condition of his employment, and consistent with plaintiff's practice of protecting its confidential and proprietary information, defendant was required to execute a written "Non-Competition Agreement" ("non-competition agreement") which provided, *inter alia*, that

3.3 During the term of his employment by the Company and for the Period, Employee will not, directly or indirectly:

- (a) Solicit Business from, divert Business from, or attempt to convert to any Company competitor, any Customer,
- (b) Within the Territory, be engaged in the Business, or employed, concerned, or financially interested in any entity engaged in the Business; or
- (c) Solicit for employment or employ any Company Employee or otherwise induce any Company Employee to terminate his employment with the Company.

The non-competition agreement prohibited the conduct set forth above for a period of one year following defendant's termination of employment with plaintiff. The territory in which defendant was prohibited from directly engaging in plaintiff's business or working for a competitor engaged in plaintiff's business covered North Carolina and South Carolina. The duration of the covenant not to compete with plaintiff within North Carolina and South Carolina, found in subsection (b) above, automatically extended one day for each day defendant was in violation of the covenant.

The non-competition agreement also prohibited defendant from ever using, revealing, or disclosing any of plaintiff's confidential and proprietary information, without the prior written authorization of plaintiff. The agreement stated that this obligation would survive any future termination of the agreement.

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On 18 May 2001, defendant advised plaintiff that he intended to resign, and on 22 May 2001, defendant informed plaintiff that he intended to work for Shields, Inc. ("Shields"), one of plaintiff's direct competitors. Defendant allegedly began working for Shields in Winston-Salem, North Carolina, in the same capacity in which he worked for plaintiff, on or about 24 May 2001.

On 31 May 2001, plaintiff filed a complaint alleging that defendant's employment with Shields was a violation of the non-competition agreement entered into between the parties. Plaintiff further alleged that "defendant has wrongfully misappropriated [plaintiff's] trade secrets and confidential and proprietary information in violation of N.C.G.S. §66-152 *et seq.*" Asserting that defendant's conduct in violation of the parties' agreement threatened irreparable harm and damage to plaintiff's ability to do business with its customers, plaintiff prayed for a temporary restraining order (TRO), preliminary injunction, and permanent injunction. Judge Stephens issued a TRO on 31 May 2001 prohibiting defendant from working in North Carolina or South Carolina for Shields, or any of plaintiff's other competitors, and from using, revealing, or disclosing any of plaintiff's trade secrets or confidential and proprietary business information. In connection with the TRO, plaintiff was required to post an \$800.00 bond to secure defendant from any damages incurred were it later determined that the TRO was wrongfully issued.

By order entered 20 June 2001, Judge Narley Cashwell converted the TRO into a preliminary injunction. In so doing, the trial court determined that plaintiff had established a reasonable likelihood of prevailing on its claims that defendant had violated the non-competition agreement and that plaintiff would suffer irreparable injury if defendant were allowed to work for Shields or any other competitor, or if defendant were allowed to disclose plaintiff's confidential and proprietary business information. The order converting the TRO to a preliminary injunction is silent as to whether the \$800.00 bond was carried forward to cover the preliminary injunction and/or whether plaintiff was required to post additional security prior to the entry of the preliminary injunction. In addition, the record on appeal does not indicate whether defendant presented argument to the trial court that the \$800.00 bond was inadequate security, or whether the trial court considered the question of whether additional security should be required of plaintiff.

Defendant filed a motion to stay enforcement of the preliminary injunction, which was denied by the trial court on 6 July 2001.

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Defendant then filed a Petition for Writ of Supersedeas and Motion for Temporary Stay with this Court on 13 July 2001. On 16 July 2001, an order allowing defendant's Motion for Temporary Stay was entered, and on 25 July 2001 this Court allowed defendant's Petition for Writ of Supersedeas. Plaintiff petitioned for review of these orders by writ of certiorari to the North Carolina Supreme Court, and the Supreme Court denied plaintiff's petition on 10 May 2002.¹

[1] On appeal, defendant challenges the trial court's preliminary injunction. Defendant fails to present argument against that portion of the preliminary injunction which restrains him from using, revealing or disclosing to third parties any of plaintiff's trade secrets or confidential and proprietary business information. Thus, that portion of the preliminary injunction is not before us for review. We only review that portion of the preliminary injunction prohibiting defendant from directly engaging in plaintiff's business or working for a competitor engaged in plaintiff's business.

In *A.E.P. Industries v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983), our Supreme Court addressed the appealability of preliminary injunctions as follows:

A preliminary injunction is interlocutory in nature, issued after notice and hearing, which restrains a party pending final determination on the merits. G.S. § 1A-1, Rule 65. Pursuant to G.S. § 1-277 and G.S. § 7A-27, no appeal lies to an appellate court from an interlocutory order or ruling of a trial judge unless such order or ruling deprives the appellant of a substantial right which he would lose absent a review prior to final determination.

Id. at 400, 302 S.E.2d at 759. "Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment." *State v. School*, 299 N.C. 351, 358, 261 S.E.2d 908, 913 (1980).

1. As a result of this Court's grant of defendant's motion for temporary stay and petition for writ of supersedeas, defendant has only been prohibited from competing against plaintiff from 31 May 2001 (the date the TRO was issued) until 16 July 2001 (the date this Court granted defendant's motion for temporary stay), a total of forty-seven (47) days. Since the covenant not to compete has a one-year time restriction, plaintiff has not gotten the benefit of the agreement. Thus, the dispute between plaintiff and defendant remains a live controversy and the issues raised in this appeal remain justiciable.

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In the instant case, defendant has been deprived of a substantial right because the preliminary injunction prevents him from working for any company engaged in the business of manufacturing, selling, and installing interior and exterior wall systems, walls, or partitions in North Carolina and South Carolina. This restriction effectively prohibits defendant from earning a living and practicing his livelihood in North Carolina and South Carolina. Accordingly, we conclude that a substantial right of defendant, the right to earn a living and practice his livelihood, will be adversely affected if the instant preliminary injunction escapes immediate appellate review. *See Milner Airco, Inc. v. Morris*, 111 N.C. App. 866, 433 S.E.2d 811 (1993) (finding substantial right where injunction prevented defendants from working during season installing air-conditioning units); *Masterclean of North Carolina v. Guy*, 82 N.C. App. 45, 345 S.E.2d 692 (1986) (finding substantial right where injunction would prevent defendant from practicing his livelihood in five states).

[2] Concerning the issuance of a preliminary injunction, the Supreme Court has stated:

A preliminary injunction . . . is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation. *Waff Bros., Inc. v. Bank*, 289 N.C. 198, 221 S.E.2d 273; *Pruitt v. Williams*, 288 N.C. 368, 218 S.E.2d 348; *Conference v. Creech*, 256 N.C. 128, 123 S.E.2d 619.

Investors, Inc. v. Berry, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (emphasis in original); *accord Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 227, 393 S.E.2d 855, 856-57 (1990).

In reviewing a trial court's grant of a preliminary injunction, "an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *A.E.P. Industries*, 308 N.C. at 402, 302 S.E.2d at 760. However, while an appellate court is not bound by the findings or ruling of the lower court, there is a presumption that the lower court's decision was correct, and the burden is on the appellant to show error. *Conference v. Creech*, 256 N.C. 128, 140, 123 S.E.2d 619, 626-27 (1962). Thus, "a decision by the trial court to issue or deny an injunction will be upheld if there is ample com-

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petent evidence to support the decision, even though the evidence may be conflicting and the appellate court could substitute its own findings.” *Wrightsville Winds Homeowners’ Assn. v. Miller*, 100 N.C. App. 531, 535, 397 S.E.2d 345, 346 (1990).

Finally, “we note that the findings of fact and other proceedings of the trial court which hears the application for a preliminary injunction are not binding at a trial on the merits.” *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 16, 431 S.E.2d 828, 835 (1993). “The same is true of our decision upon this appeal and our statement of the facts upon which our conclusion rests.” *Bd. of Elders v. Jones*, 273 N.C. 174, 181, 159 S.E.2d 545, 551 (1968).

By two of his assignments of error, defendant contends that the trial court erred in determining that plaintiff had shown a likelihood of success on the merits of its case. Defendant failed to assign error to the trial court’s determination that plaintiff was likely to sustain irreparable loss or injury if the injunction did not issue. Thus, this appeal only concerns the first prong of the test for reviewing a preliminary injunction—plaintiff’s likelihood of prevailing on the merits.

In this State, a covenant not to compete is valid and enforceable if it is “(1) in writing; (2) reasonable as to terms, time, and territory; (3) made a part of the employment contract; (4) based on valuable consideration; and (5) not against public policy.” *Triangle Leasing Co. v. McMahon*, 327 N.C. App. at 228, 393 S.E.2d at 857. *See also Whittaker General Medical Corp. v. Daniel*, 324 N.C. 523, 379 S.E.2d 824 (1989); *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 370 S.E.2d 375 (1988).

Defendant first contends that plaintiff cannot show a likelihood of success on the merits because the covenant not to compete was not supported by valuable consideration. Specifically, defendant contends that he signed the covenant not to compete seven to ten days after he was employed and that there was no additional consideration provided to support the covenant not to compete. We disagree with defendant’s contention.

It is well established in North Carolina that “the promise of new employment is valuable consideration and will support an otherwise valid covenant not to compete contained in the initial employment contract.” *Wilmar, Inc. v. Corsillo*, 24 N.C. App. 271, 273, 210 S.E.2d 427, 429 (1974); *accord Milner Airco*, 111 N.C. App. at 869, 433 S.E.2d

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at 813. However, if an employment relationship already exists without a covenant not to compete, any such future covenant must be based upon new consideration. *Greene Co. v. Kelley*, 261 N.C. 166, 134 S.E.2d 166 (1964).

In the instant case, the evidence shows that the “Non-Competition Agreement” signed by defendant states that the parties entered into the agreement on 27 October 1997. In addition, the agreement addresses consideration as follows:

2. **Consideration.** The consideration to the Employee for this Agreement is his employment by the Company as an Estimator/Project Manager effective on or about October 27, 1997. The Employee acknowledges that this Agreement was entered into as an express condition of his employment by the Company and was entered into contemporaneously with commencement of that employment.

The unambiguous language of the non-competition agreement provides the best evidence of when the parties entered into it. Further, the affidavits of Gary Roth, Executive Vice President and Chief Operating Officer of Precision Walls, and Tim Nutt, Precision Walls employee who witnessed defendant’s signature on the non-competition agreement, corroborate that the agreement was entered into on 27 October 1997 prior to, and as a condition of, defendant’s employment with plaintiff. This evidence contradicts defendant’s assertion that he signed the covenant not to compete some seven to ten days after beginning his employment with plaintiff. We find this evidence sufficient to show the requisite likelihood that plaintiff will be able to show that the covenant to compete was based on valuable consideration. Thus, defendant’s first assignment of error is overruled.

[3] Defendant next contends that plaintiff cannot show a likelihood of success on the merits because the covenant not to compete is unreasonable as to time, territory, and the scope of activity prohibited. We again disagree.

In evaluating the reasonableness of time and territory restrictions, the two elements must be considered in tandem because the two requirements are not independent and unrelated. *Farr Associates, Inc. v. Baskin*, 138 N.C. App. 276, 280, 530 S.E.2d 878, 881 (2000). “Although either the time or the territory restriction, standing alone, may be reasonable, the combined effect of the two may be unreasonable.” *Id.* “A longer period of time is ac-

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ceptable where the geographic restriction is relatively small, and *vice versa*. *Id.* (citing *Jewel Box Stores v. Morrow*, 272 N.C. 659, 158 S.E.2d 840 (1968)).

In the instant case, the one year time restriction is well within the established parameters for covenants not to compete. *See Enterprises, Inc. v. Heim*, 276 N.C. 475, 173 S.E.2d 316 (1970) (upholding a nationwide two year restriction); *Associates, Inc. v. Taylor*, 29 N.C. App. 679, 225 S.E.2d 602 (1976) (upholding a multi-state two year restriction). In determining the overall reasonableness of the covenant not to compete, we evaluate the territorial restriction in light of the relatively short duration of the time restriction.

In evaluating the reasonableness of the territorial restriction in a covenant not to compete, this Court has focused on the following six factors: (1) the area or scope of the restriction; (2) the area assigned to the employee; (3) the area in which the employee actually worked; (4) the area in which the employer operated; (5) the nature of the business involved; and (6) the nature of the employee's duty and knowledge of the employer's business operation. *Hartman v. W. H. Odell and Assoc., Inc.*, 117 N.C. App. 307, 312, 450 S.E.2d 912, 917 (1994). The scope of the territorial restriction must not be any wider than is necessary to protect the employer's reasonable business interests. *Triangle Leasing Co.*, 327 N.C. at 229, 393 S.E.2d at 857.

Here, the preliminary injunction only restricts defendant from working in two of the twelve states in which plaintiff conducts business. Although defendant only worked out of plaintiff's Greensboro office, he was aware of information affecting business in both North Carolina and South Carolina, such as pricing arrangements with suppliers, labor costs, and profit margins. By affidavit, Bruce Wolfe, branch manager for plaintiff, stated that he was informed that one of plaintiff's subcontractors had been contacted by defendant on 24 May 2001, defendant's first day working for Shields, about performing subcontract work for Shields. In addition, the record shows that defendant's position with Shields was almost identical to his job with plaintiff; defendant was an Estimator/Project Manager for plaintiff, while defendant stated in his affidavit that he would "estimate jobs and will be a project manager" for Shields. Accordingly, we conclude that it is within plaintiff's legitimate business interest to prohibit defendant from working in an identical position with a competing business in North Carolina and South Carolina. Thus, we hold that the time and territory restrictions in the covenant not to compete are reasonable.

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Defendant further argues that the scope of the activity prohibited by the covenant not to compete is unreasonable because it prevents him from working in plaintiff's business in any capacity, not just as an Estimator/Project Manager. However, we conclude that defendant would not be less likely to disclose the information and knowledge garnered from his employment with plaintiff if he worked for one of plaintiff's competitors in a position different from the one in which he worked for plaintiff. If defendant's new employer asked him about information he gained while working for plaintiff, defendant would likely feel the same pressure to disclose the information. Thus, plaintiff's legitimate business interest allows the covenant not to compete to prohibit employment of any kind by defendant with a direct competitor.

[4] By his final assignment of error, defendant contends that the trial court erred in not considering whether a bond or security was necessary to protect the defendant, thus rendering the preliminary injunction defective as a matter of law.

N.C. R. Civ. P. 65(c) provides in pertinent part:

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, *in such sum as the judge deems proper*, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

N.C. R. Civ. P. 65(c) (2001) (emphasis added).

In the instant case, the record shows that Judge Stephens required an \$800.00 security bond in connection with the issuance of the temporary restraining order. This was in compliance with N.C. R. Civ. P. 65(c). It was not necessary, if upon the hearing to show cause the trial court continued the temporary restraining order as a preliminary injunction pending final determination at trial, for the trial court to require a new security bond or consider the adequacy of the one posted, "unless for some reason and upon proper suggestion, it should be made to appear that the bond already given was insufficient." *Preiss v. Cohen*, 112 N.C. 278, 283, 17 S.E. 520, 521 (1893). The record on appeal is silent as to whether defendant made any argument that the security was insufficient and needed to be increased. It was defendant's duty to bring forward a record on appeal sufficient to show that he had contested the amount of security at the hearing to show cause. Having failed to do so, defendant cannot advance such

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argument on appeal. Accordingly, defendant's final assignment of error is overruled.

For the foregoing reasons, the trial court's order granting a preliminary injunction in favor of plaintiff is affirmed.

Affirmed.

Judges WYNN and THOMAS concur.



IN THE MATTER OF: APPEAL OF THE MASTER'S MISSION FROM THE DECISION OF THE GRAHAM COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING PROPERTY TAX FOR TAX YEAR 1997

No. COA01-990

(Filed 3 September 2002)

1. Taxation— ad valorem—non-profit corporation—educational exemption

A whole record review reveals that the Property Tax Commission did not err by affirming a county board's decision finding that 100 acres owned by taxpayer non-profit corporation to train missionaries were exempt from ad valorem taxation but that the taxpayer did not meet its burden of proving that its 1,247 acres similarly owned were entitled to an educational tax exemption under N.C.G.S. § 105-278.4, because: (1) in deciding whether something qualifies as an educational purpose, our courts have consistently held that it is not the nature of the character of the owning entity which ultimately determines whether property shall be exempt from taxation, but it is the use to which the property is dedicated which controls; (2) taxpayer did not show that all of its buildings or the camping area are used wholly and exclusively for educational purposes; and (3) taxpayer failed to show that it requires more than 100 acres to buffer it from encroaching urbanization, development, or other forces that might compromise its educational purpose.

2. Appeal and Error— preservation of issues—failure to address in assignment of error

Although taxpayer non-profit corporation contends that the Property Tax Commission erred when it displayed unfairness and

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prejudice to the taxpayer, this argument is dismissed because none of taxpayer's assignments of error address this issue.

Appeal by taxpayer from decision entered 30 April 2001 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 14 May 2002.

Morgan, Herring, Morgan, Green, Rosenblutt & Gill, L.L.P., by David K. Rosenblutt, for appellant-taxpayer.

Parker, Poe, Adams & Bernstein, L.L.P., by Charles C. Meeker, for appellee Graham County.

HUDSON, Judge.

The Master's Mission ("TMM") appeals a decision of the Property Tax Commission (the "Commission") affirming the decision of the Graham Board of Equalization and Review (the "Board") which found that 100 acres owned by TMM were exempt from *ad valorem* taxation, but 1,247 acres similarly owned were not exempt. We affirm.

TMM describes itself as a "training base" which "provides a unique setting for thorough and 'hands on' preparations for missions service." In its brochure, TMM describes its operations as:

Our Technical curriculum teaches and develops skills necessary for opening and maintaining missions work in whatever field of service God directs. Courses include building construction on roads and dams, airstrip construction, mechanics, bush living, water systems, community development, health and first aid, food purchasing and storage, gardening, small animal husbandry, and family living skills that are a must for ministers of the gospel.

TMM owns 1,347 acres in Graham County along the Tennessee border, and operates as a non-profit 501(c)(3) corporation with federal tax-exempt status pursuant to the Internal Revenue Service Code. TMM uses the Graham County property to train missionaries and prepare them for mission trips to remote areas of the world. In the center of the property are several residential structures around a lake. These structures house staff members and guests, as well as the main business office for the operation. Cabins for missionary trainees are located away from the lake, separate from the other residential and business structures. School, community, and church groups

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use a campsite on the southeast corner of the property for recreational purposes without charge. The remainder of the land is largely undeveloped.

TMM applied to the Graham County Assessor ("Assessor") for tax exempt status for all of its buildings and land for the 1997 tax year. The Assessor granted TMM an exemption for all structures used to house or train missionaries, as well as 100 acres of the 1,347 acre lot. It did not grant tax-exempt status for the remaining buildings and 1,247 acres. TMM appealed to the Board, and the Board declined to change the exemption status designated by the Assessor. TMM appealed, and the Commission conducted a hearing on 15 March 2001. At the conclusion of TMM's evidence, Graham County (the "County") moved to dismiss TMM's appeal on the grounds that TMM "failed to carry its burden of showing its entitlement to any exemption beyond that already granted by Graham County." The Commission voted to grant the County's motion. On 30 April 2001, the Commission entered a Final Decision granting the County's motion to dismiss TMM's appeal, affirming the decision of the Board, and denying tax-exempt status to TMM. TMM appealed to this Court.

On appeal, the standard of review for a decision of the Commission is controlled by N.C. Gen. Stat. § 105-345.2. "Record on appeal; extent of review." (2001). *See also In re Southview Presbyterian Church*, 62 N.C. App. 45, 46-47, 302 S.E.2d 298, 299 (1983) (describing the scope of review as dictated by N.C.G.S. § 105-345.2). Subsection (b) of that statute provides, in part, that the appellate court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action." N.C.G.S. § 105-345.2(b). Subsection (b) further provides that the appellate court may grant various forms of relief

if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional provisions; or
- (2) In excess of statutory authority or jurisdiction of the Commission; or
- (3) Made upon unlawful proceedings; or
- (4) Affected by other errors of law; or

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- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

N.C.G.S. § 105-345.2(b). Subsection (c) requires that the appellate court “review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error.” N.C.G.S. § 105-345.2(c). “While the weighing and evaluation of the evidence is in the exclusive province of the Commission, where the evidence is conflicting, the appellate court must apply the ‘whole record’ test to determine whether the administrative decision has a rational basis in the evidence.” *Southview*, 62 N.C. App. at 47, 302 S.E.2d at 299 (internal citations omitted).

Before addressing TMM's first argument, we note that in matters before the Commission, the taxpayer bears the burden of proving that its property is entitled to an exemption under the law. *See In re Appeal of Southeastern Bapt. Theol. Seminary, Inc.*, 135 N.C. App. 247, 249, 520 S.E.2d 302, 304 (1999). “This burden is substantial and often difficult to meet because all property is subject to taxation unless exempted by a statute of statewide origin.” *In re Appeal of Atlantic Coast Conference*, 112 N.C. App. 1, 4, 434 S.E.2d 865, 867 (1993), *aff'd*, 336 N.C. 69, 441 S.E.2d 550 (1994). Here, the Commission granted the County's motion to dismiss TMM's appeal, because it found that TMM did not carry its burden. We review the “whole record” to determine whether the evidence supports the Commission's findings of fact, and whether those findings of fact support the Commission's conclusion that TMM did not carry its burden of proof. *See* N.C.G.S. § 105-345.2.

[1] In its first argument, TMM contends that the Commission erred in affirming the decision of the Board in that (1) the Commission's findings of fact were not supported by the evidence, and (2) the Commission's conclusions of law were unsupported by its findings of fact and the evidence presented. TMM bases its argument on the fact that the Commission only heard TMM's portion of the evidence. The Commission did not specifically find that the witnesses lacked credibility and TMM argues that “[n]early all of the evidence strongly and directly contradicts the Conclusions of Law.”

First, TMM contends that the Commission erred in finding that substantial evidence supported findings of fact numbers 6, 7, and 8. They are as follows:

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6. The Master's Mission site is one of the largest privately owned tracts in Graham County. It is widely known that a substantial majority of Graham County is owned by the United States Forest Service, the Tennessee Valley Authority and an Indian tribe. At 640 acres per square mile, the 1,347 acres owned by [TMM] encompass more than two square miles.

7. [TMM] has tax exempt status under the Internal Revenue Service Code as a 501(c)(3) corporation. [TMM] does not pay State or Federal income taxes. [TMM] does receive local and State services, including health care, inspections and public school education. An unpaved State road is adjacent to [TMM] property.

8. The Master's Mission site is steep and much of the relatively flat area has been developed. As of January 1, 1997, there was a campsite located on the southeast corner of [TMM's] property. This campsite was used by school, community and church groups for recreational purposes. There was no showing that regular instruction or courses of study occurred at the campsite.

The first two sentences of number 6 are characterizations of the tract taken directly from the arguments of counsel, rather than from testimony. The last sentence addresses the size of the tract and is supported by testimony from Paul Teasdale, the founder and director of TMM. The unsupported portion of this finding of fact has no bearing on the Conclusions of Law contested by TMM; any error is thus harmless. The only relevant portion of finding of fact number 7, describing the federal tax-exempt status of TMM, is supported by the testimony of Jeffrey Cole, the business manager for TMM. Finding of fact number 8 is supported by the testimony of Mr. Teasdale. The last sentence correctly reflects the whole record, when it states that "[t]here was no showing that regular instruction or courses of study occurred at the campsite."

Having determined that the relevant findings are supported by the record, we turn to the one remaining question of law: whether the Commission's findings support its conclusions and decision that TMM did not meet its burden of proving that it is entitled to a tax exemption pursuant to N.C. Gen. Stat. § 105-278.4. "Real and personal property used for educational purposes." (2001). For the reasons discussed below, we affirm the Commission's decision.

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TMM contends that the Commission incorrectly denied tax-exempt status to the remaining 1,247 acres and buildings on its site pursuant to N.C.G.S. § 105-278.4. TMM assigns error only to those conclusions of law concerning the educational exemption, not the charitable or religious exemptions found in N.C. Gen. Stat. §§ 105-278.3 & 278.6 (2001), and thus, we review only whether the educational exemption applies here. *See* N.C. R. App. Proc. 10 (2001) (limiting the appellate court's review to "consideration of those assignments of error set out in the record on appeal"). TMM contests the following conclusions of law:

6. [TMM] can be viewed as an entity, which is an educational institution in that it provides an eleven-month course of study for missionary trainees. [TMM], however, failed to show that all of its buildings and land are wholly and exclusively used for educational purposes. Rather, approximately half of the buildings are used for staff and guest housing and for an office for the general business of [TMM]. Graham County thus properly exempted the buildings, which are used by the missionary trainees for studying or living and did not exempt the remaining structures.

7. [TMM] contends that all of its land should be exempt because missionary training must take place in a remote setting and extended buffers are needed to create such an environment. G.S. § 105-278.4, however, authorizes exemption of "[b]uildings, the land they occupy, and additional land reasonably necessary for the convenient use of any such building." [TMM] failed to show that more than 100 acres, which was exempted by Graham County, is needed for the use of the cabins or classrooms. Indeed, [TMM's] site is over two square miles in size, and only three or four missionary families were training at the site during tax year 1997.

TMM contends that pursuant to N.C.G.S. § 105-278.4(a) and this Court's decision in *Southeastern*, 135 N.C. App. 247, 520 S.E.2d 302, all of its buildings should be exempted from taxation, because they are necessary for the educational function of the institution. N.C.G.S. § 105-278.4(a) provides:

(a) Buildings, the land they actually occupy, and additional land reasonably necessary for the convenient use of any such building shall be exempted from taxation if:

- (1) Owned by an educational institution (including a university, college, school, seminary, academy,

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industrial school, public library, museum, and similar institution);

- (2) The owner is not organized or operated for profit and no officer, shareholder, member, or employee of the owner or any other person is entitled to receive pecuniary profit from the owner's operations except reasonable compensation for services;
- (3) Of a kind commonly employed in the performance of those activities naturally and properly incident to the operation of an educational institution such as the owner; and
- (4) Wholly and exclusively used for educational purposes by the owner or occupied gratuitously by another nonprofit educational institution (as defined herein) and wholly and exclusively used by the occupant for nonprofit educational purposes.

"Application of the statutory tax exemption turns on whether [an institution] is '[w]holly and exclusively' educational in nature." *In re Appeal of Chapel Hill Day Care Ctr., Inc.*, 144 N.C. App. 649, 653, 551 S.E.2d 172, 175 (2001) (holding that the day care center at issue had a custodial purpose and was not "wholly and exclusively" educational in nature), *disc. rev. denied*, 355 N.C. 492, 563 S.E.2d 564 (2002). Graham County did exempt the training center, thirteen trainees' cabins, women's classrooms, and the bunkhouse from taxation, because these buildings are used for educational purposes. TMM argues that the owner's home, the guest house, office building, duplex, and storage building should also be exempt because these buildings are similarly necessary to the educational purposes of the institution. However, the Commission found as fact the following, which TMM does not contest on appeal:

3. During 1997, [TMM] had three or four missionary families in training. These families included a husband and wife. The missionary trainees lived in the cabins on the site and received instruction at the classrooms. The remaining cabins were used for visitors.

4. The other structures at the site are used for staff housing, guest housing and an office at which the general business of [TMM] is conducted. On a typical day, as many as 50 people are present on the grounds of [TMM]. The missionary

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trainees and their instructors make up a small minority of these individuals.

These findings of fact support the Commission's conclusions that the Board properly denied tax exempt status to buildings beyond those already exempted. "In deciding whether or not something qualifies as an educational purpose, our courts have consistently held 'that it is not the nature or the character of the owning entity which ultimately determines whether property shall be exempt from taxation, but it is the use to which the property is dedicated which controls.'" *Atlantic*, 112 N.C. App. at 9-10, 434 S.E.2d at 870 (quoting *In re Wake Forest University*, 51 N.C. App. 516, 520, 277 S.E.2d 91, 94, *disc. rev. denied*, 303 N.C. 544, 281 S.E.2d 391 (1981)). Here, the buildings at issue are used for many purposes: as housing for the owner and director of TMM, as lodging for guests who come to the property for any purpose, as a business office for the daily business operation, and as storage for equipment used for many purposes on the property. Mr. Teasdale testified that one of the purposes of his entire organization is "sending" missionaries to different parts of the world. We do not believe that this purpose qualifies as "wholly and exclusively" educational, as required by the statute. We find nothing else in the whole record to indicate that all of the buildings are used "wholly and exclusively" for educational purposes, and we agree with the conclusion that TMM has not met its burden of proving that its buildings are all entitled to an education exemption from *ad valorem* taxation.

TMM also contends that the non-exempted 1,247 acres of its land are entitled to an education exemption. Pursuant to N.C.G.S. § 105-278.4,

(b) Land (exclusive of improvements); and improvements other than buildings, the land actually occupied by such improvements, and additional land reasonably necessary for the convenient use of any such improvement shall be exempted from taxation if:

(1) Owned by an educational institution that owns real property entitled to exemption under the provisions of subsection (a), above;

(2) Of a kind commonly employed in the performance of those activities naturally and properly incident to the operation of an educational institution such as the owner; and

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(3) Wholly and exclusively used for educational purposes by the owner or occupied gratuitously by another nonprofit educational institution (as defined herein) and wholly and exclusively used by the occupant for nonprofit educational purposes.

The Board granted tax-exempt status to one hundred acres in order to provide a "buffer zone" around the buildings and areas used "wholly and exclusively" for educational purposes. The Commission declined to extend the exemption, concluding the following:

9. The use of the campground by outside groups, although a commendable community service, cannot be considered wholly and exclusive educational in nature since there was no showing of a course of study or other education during the camp-outs. Also, the use of one or more rough roads for practice driving during one or more weeks of the year by missionary trainees also does not show whole and exclusive educational use of those roads and the adjoining hundreds of acres during the tax year in question. Finally, the 100 acres, which were exempted, provide a sufficient buffer for the three or four missionary families who were on site in tax year 1997.

As indicated earlier in this opinion, TMM presented no evidence, and the Commission did not find as fact, that the camping area is used "wholly and exclusively" for educational purposes. Both the director and the business manager of TMM testified that different church and school groups used the campsite. Mr. Teasdale stated that "they start learning about missions from that," and Mr. Cole said that young people and their families use it "so that they understand more about missions." The grounds are also open to community and public groups for camping. While this purpose is arguably educational, it is not "wholly and exclusively" so. Therefore, the campsite does not satisfy the requirements of N.C.G.S. § 105-278.4(b).

As to the remaining acres, the Commission concluded that "[t]he Master's Mission failed to show that more than 100 acres, which was exempted by Graham County, is needed for the use of the cabins or classrooms" and "the 100 acres, which were exempted, provide a sufficient buffer for the three or four missionary families who were on site in tax year 1997." A "buffer zone" is additional land around an exempt building or portion of land that is "reasonably necessary for the convenient use of any such" land or building. N.C.G.S. § 105-278.4(a) & (b). "We have held that buffering is an appropriate

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consideration in determining whether an educational exemption applies to a particular parcel." *Southeastern*, 135 N.C. App. at 257, 520 S.E.2d at 308. Our Courts have refused to "draw bright lines or to quantify the amount of acreage a church reasonably may purchase for the purpose of establishing a buffer zone. Each case turns upon its unique facts, and appellate courts will view with a careful eye any acquisition of extensive acreage under less compelling facts." *In re Appeal of Worley*, 93 N.C. App. 191, 198, 377 S.E.2d 270, 274 (1989). We recognize that some cases we cite involve a religious exemption, not an educational one, but we believe these cases are analogous on this point.

In *Worley*, this Court held that a five acre buffer zone was exempt from taxation because it was necessary "to protect the sanctity and serenity of the church from encroaching industrial development." *Id.* at 197, 377 S.E.2d at 274. There, the five acres were undeveloped and used regularly by church youth groups for recreational church related activities, as well as by church members for hunting deer. *See id.* In *Southeastern*, a case concerning an educational exemption for undeveloped land surrounding a seminary, this Court held that the lots buffered the campus from a major highway and encroaching urbanization. *See Southeastern*, 135 N.C. App. at 257, 520 S.E.2d at 308. The Court explained that these parcels were part of the original Wake Forest campus purchased by the seminary, that the seminary intended to maintain a rural campus, and "that students use all the disputed parcels for various activities consistent with the educational philosophy of the Seminary." *Id.*

Here, TMM failed to show that it requires more than 100 acres to buffer it from encroaching urbanization, development, or other forces that might compromise its educational purpose. TMM contends that the entire property is used for educational purposes, that is, to teach missionary trainees the skills needed to live in remote parts of the world, and moreover, that this land is also required as a buffer. Mr. Cole testified that he was concerned about a water bottling company that borders the property, and that some neighboring private individuals might allow their property to be logged. Neither of these concerns constitute a threat to the exempt area of this property, nor are they comparable to the encroachments in *Southeastern* or *Worley*, where major highways and urban development came within a distance of only a few acres of the property used for educational or religious purposes. TMM was granted an exemption for 100 acres, an acreage the Commission concluded was adequate to protect the cab-

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ins and schools of the three or four families on the site in 1997. After reviewing the whole record, we find nothing to indicate that the Commission's conclusion was incorrect.

[2] In its second argument, TMM contends that the Commission "erred when it displayed unfairness and prejudice to the taxpayer." TMM points to several statements and questions posed during the hearing. However, since none of TMM's assignments of error address this issue, this argument is not properly before this Court. Pursuant to Rule 10 of the North Carolina Rules of Appellate Procedure ("the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal"), we decline to address this argument.

We affirm the Commission's decision that TMM failed to carry its burden of proving that it is entitled to any education tax exemption pursuant to N.C.G.S. § 105-278.4 beyond that granted by Graham County.

Affirmed.

Judges GREENE and BIGGS concur.

KATHY F. GOODWIN, PLAINTIFF-APPELLANT V. WILLIAM R. WEBB, JR., AS EXECUTOR OF
THE ESTATE OF CLAUDIUS KRESS GOODWIN, DECEASED, DEFENDANT-APPELLEE

No. COA01-1063

(Filed 3 September 2002)

Divorce— separation agreement—ratification

The trial court erred by granting summary judgment for defendant as to plaintiff's ratification of a separation agreement where there was evidence from which a jury could find that plaintiff signed the agreement under duress which continued until her husband's death, an affidavit from a psychologist could lead to the conclusion that plaintiff lacked full understanding of the agreement and was thus incapable of ratifying it, and plaintiff's deposition testimony was equivocal regarding her understanding of the agreement.

Judge GREENE dissenting.

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Appeal by plaintiff from order entered 4 June 2001 by Judge C. Preston Cornelius in Anson County Superior Court. Heard in the Court of Appeals 4 June 2002.

Baucom, Claytor, Benton, Morgan & Wood, P.A., by Rex C. Morgan, for plaintiff-appellant.

Etheridge, Moser, Garner, Bruner & Wansker, P.A., by Terry R. Garner, for defendant-appellee.

BIGGS, Judge.

Plaintiff (Kathy Goodwin) appeals from an order granting summary judgment in favor of defendant (William Webb), Executor of Estate of Claudius Goodwin (Goodwin), deceased. For the reasons that follow, we reverse.

Plaintiff and Goodwin were married in 1974. They separated in 1999, executed a "Separation and Property Settlement Agreement" (the agreement) on 10 February, 1999, and were separated at the time of Goodwin's death in December, 1999. On 1 May 2001, plaintiff filed a complaint against defendant, seeking to set aside the agreement. Plaintiff alleged that her execution of the agreement was procured by coercion, duress, threats of physical abuse, mental abuse, and undue influence by Goodwin. She sought a dissenting spouse's share, and a year's allowance from Goodwin's estate. In his answer, defendant denied plaintiff's allegations and raised the defenses of laches, ratification, and estoppel. On 14 May 2001, defendant filed a motion seeking summary judgment, on the grounds that due to plaintiff's ratification of the agreement, she was estopped from challenging its validity. On 4 June 2001, the trial court granted defendant's motion for summary judgment. Plaintiff appeals from this order.

Standard of Review

Summary judgment is only proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, 56(c) (2001); *Department of Transp. v. Idol*, 114 N.C. App. 98, 100, 440 S.E.2d 863, 864 (1994). "Summary judgment is a drastic remedy. Its purpose is not to provide a quick and easy method for clearing the docket, but is to permit the disposition of cases in which there is no genuine controversy concerning any fact, material to issues raised by the pleadings, so that the litigation

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involves questions of law only.” *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 51, 191 S.E.2d 683, 688 (1972). Summary judgment should therefore “be cautiously used so that no one will be deprived of a trial on a genuine, disputed issue of fact. The moving party has the burden of clearly establishing the lack of triable issue, and his papers are carefully scrutinized and those of the opposing party are indulgently regarded.” *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). Moreover, “Rule 56 does not authorize the court to decide an issue of fact, but rather to determine whether a genuine issue of fact exists.” *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975). If issues of material fact are in controversy, summary judgment is not appropriate. *Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 547 S.E.2d 850 (2001).

On appeal, this Court’s standard of review involves a two-step determination of whether (1) the relevant evidence establishes the absence of a genuine issue as to any material fact, and (2) either party is entitled to judgment as a matter of law. *Von Viczay v. Thoms*, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000), *aff’d*, 353 N.C. 445, 545 S.E.2d 210 (2001) (citations omitted). Further, “the evidence presented by the parties must be viewed in the light most favorable to the non-movant.” *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

Plaintiff argues that the evidence presented genuine issues of material fact with respect to her ratification of the agreement, and, therefore, that the trial court erred by granting defendant’s summary judgment motion. We agree.

Plaintiff alleged that her execution of the agreement was obtained under duress. A separation agreement executed while a party is acting under duress is invalid and can be set aside. *Cox v. Cox*, 75 N.C. App. 354, 356, 330 S.E.2d 506, 508 (1984). Duress occurs when a party is induced to perform or forego some act under circumstances depriving her of the exercise of her free will. *Link v. Link*, 278 N.C. 181, 194, 179 S.E.2d 697, 704-05 (1971).

In the instant case, plaintiff offered the following evidence in support of her contention that she signed the agreement under duress and that the duress continued until Goodwin’s death: Forrest Hildebrand, a friend of both plaintiff and Goodwin, testified by deposition that Goodwin told him that he forced Plaintiff to sign the Agreement by threatening that “if she didn’t sign the papers he was

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going to beat the hell out of her.” In addition, plaintiff testified by deposition that Goodwin threatened plaintiff throughout their marriage, that he had frequently beaten her, and that during the weeks before she signed the Agreement, Goodwin told plaintiff if she did not sign the Agreement, he would “beat the hell out of [her].” Plaintiff also filed an affidavit stating that even after signing the Agreement, and until the time of Goodwin’s death, she “still feared that . . . Goodwin would physically harm [her] or have someone physically harm [her] if [she] did not comply with the . . . Agreement or did something to legally affect the . . . Agreement.”

In addition, plaintiff submitted the affidavit of Faye E. Sultan, Ph.D. (Dr. Sultan) who had performed a clinical evaluation of plaintiff. Dr. Sultan opined “to a reasonable degree of psychological certainty that [Plaintiff] was convinced that she had no choice but to sign the . . . Agreement . . . or risk physical assault and abuse from [Goodwin].” She also stated that the “physical and mental abuse which [plaintiff] had endured during her 25-year marriage left her unable to contest the provisions of the . . . Agreement even after it had been signed,” as she was “fearful of repercussions from [Goodwin] if she contested the [A]greement, even during the time that he was sick and in the hospital and up until the time of his death.” We conclude that there was evidence presented from which a jury could find that plaintiff signed the agreement under duress, which continued until Goodwin’s death.

“[A] transaction procured by duress may be ratified by the victim so as to preclude a subsequent suit to set [it] aside.” *Link v. Link*, 278 N.C. 181, 197, 179 S.E.2d 697, 706 (1971). A party ratifies an agreement by retroactively “authoriz[ing] or otherwise approv[ing] [of it], . . . either expressly or by implication.” Black’s Law Dictionary 1262 (6th ed. 1990). However, “there [can] be no ratification so long as the duress continue[s].” *Housing, Inc. v. Weaver*, 37 N.C. App. 284, 300, 246 S.E.2d 219, 228 (1978).

Moreover, “an act of the victim . . . will not constitute a ratification of the transaction . . . unless, at the time of such act, the victim had full knowledge of the facts and was then capable of acting freely.” *Neugent v. Beroth Oil Co.*, 149 N.C. App. 38, 55, 560 S.E.2d 829, 840 (2002) (quoting *Link, id.*) (summary judgment based on ratification improper where “[v]iewing the evidence in the light most favorable to plaintiff, plaintiff did not have full knowledge of all material facts”). See also *Fallston Finishing, Inc. v. First Union Nat. Bank*, 76 N.C. App. 347, 363, 333 S.E.2d 321, 330 (1985), (directed verdict improper

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where there was “sufficient evidence from which the jury could find that . . . [plaintiff] did not have the mental capacity to understand the consequences of his actions”). Thus, a party cannot ratify an agreement unless he possesses the requisite mental abilities:

[A] person has mental capacity sufficient to contract if he . . . [has] the ability to understand the nature of the act in which he is engaged and its scope and effect, or its nature and consequences, . . . [and is] in such possession of his faculties as to enable him to know at least what he is doing and to contract understandingly.

Ridings v. Ridings, 55 N.C. App. 630, 633, 286 S.E.2d 614, 616 (1982) (summary judgment appropriate on issue of ratification where plaintiff, although presenting evidence of mental incompetence at the time the agreement was executed, failed to show “continued incompetence”). See also *Lowry v. Lowry*, 99 N.C. App. 246, 253, 393 S.E.2d 141, 145 (1990) (upholding summary judgment based upon plaintiff’s ratification, where she was “an educated woman and . . . a licensed realtor . . . [and] the error she alleges required no legal explanation”).

In the case *sub judice*, plaintiff responded to defendant’s motion for summary judgment by offering her own affidavit and that of Dr. Sultan, a clinical psychologist. Dr. Sultan performed a clinical evaluation of the plaintiff, and subjected her to psychological testing, in addition to reviewing the Separation Agreement and other relevant documents. Her affidavit stated in part that:

1. [Plaintiff] did not have the mental or emotional capacity to understand or appreciate the contents of the Separation Agreement.
2. [Plaintiff’s] history and clinical testing are all consistent with a woman who has been abused and battered, mentally and physically, her entire life[.]
3. [Plaintiff’s] verbal IQ and ability to understand written materials is in the low 70’s. It is extremely unlikely that she understood the Separation Agreement, and it is my clinical opinion that she still does not fully understand the document.

Dr. Sultan’s affidavit, if believed, could lead a fact finder to conclude that plaintiff lacked a full understanding of the separation agreement, and thus was incapable of ratifying it. Dr. Sultan found plaintiff’s

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overall IQ in the range of 75 to 85, but her “verbal IQ and ability to understand written materials” in the “low 70’s.” See *In re LaRue*, 113 N.C. App. 807, 811, 440 S.E.2d 301, 304 (1994) (“IQ scores of 71 and 72, . . . can represent sub-average general intellectual functioning” and relevant DSM definition “permits inclusion in the Mental Retardation category of people with IQs somewhat higher than 70”). See also *State v. Brewington*, 352 N.C. 489, 518, 532 S.E.2d 496, 513 (2000) (“defendant’s full scale IQ was 76, a level just above that of mental retardation”). Significantly, the issue in the present case was not plaintiff’s general intellectual functioning, but her ability to understand the implications of a detailed legal document. Dr. Sultan stated that, based on her evaluations, plaintiff “did not have the mental or emotional capacity to understand or appreciate the contents of the Separation Agreement,” and that “[i]t is extremely unlikely that she understood the Separation Agreement, and it is my clinical opinion that she still does not fully understand the document[.]”

Moreover, plaintiff’s deposition testimony was equivocal regarding her understanding of the separation agreement. Although she acknowledged understanding that she would receive certain property under the agreement, plaintiff also testified that “I read [the agreement], but I didn’t understand it”; that she “didn’t understand” the waiver of an alimony claim; that she believed she would inherit half of her husband’s estate in addition to the property in the agreement; that she did not understand the meaning of the word ‘contend’ or what a “domestic violence proceeding” was; and that she believed the separation was only temporary. She also testified that she left school after the seventh grade, never had a personal bank account or a joint account during her marriage, and had not applied for social security benefits for certain physical conditions because she “didn’t want to admit that I’m disabled.”

We recognize that other evidence in the record, that plaintiff engaged in several transactions involving property transferred pursuant to the separation agreement, was certainly sufficient to raise the defense of ratification. However, for the trial court to determine that ratification had been conclusively established as a matter of law, it necessarily must have weighed the strength and credibility of defendant’s evidence regarding those transactions against plaintiff’s testimony and Dr. Sultan’s affidavit, indicating that plaintiff acted under ongoing duress, and did not have a “full understanding” of the separation agreement. Yet, “[i]t is for the trier of fact to resolve issues of credibility and to determine the relative strength of competing evi-

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dence.” *Upchurch v. Upchurch*, 128 N.C. App. 461, 464, 495 S.E.2d 738, 740, *disc. review denied*, 348 N.C. 291, 501 S.E.2d 925 (1998).

We conclude that the evidence raised genuine issues of material fact regarding duress, and plaintiff’s understanding of the separation agreement, thus calling into question her ability to ratify it. Accordingly, the trial court’s grant of summary judgment is

Reversed.

Judge GREENE dissents.

Judge HUDSON concurs.

GREENE, Judge, dissenting.

Because I do not believe a genuine issue of fact exists with respect to plaintiff’s ratification of the agreement, I dissent.

Ratification

Defendant contends that because plaintiff accepted all the benefits under the agreement and was not under duress at the time she accepted those benefits, she ratified the agreement and cannot now challenge it. I agree.

Duress occurs when a party is induced to perform or forego some act under circumstances depriving her of the exercise of her free will. *Link v. Link*, 278 N.C. 181, 194, 179 S.E.2d 697, 704-05 (1971). A separation agreement executed while a party is acting under duress is invalid and can be set aside. *Cox v. Cox*, 75 N.C. App. 354, 356, 330 S.E.2d 506, 508 (1985). An agreement, however, even if procured by duress, “may be ratified by the victim so as to preclude a subsequent suit to set [it] aside.” *Link*, 278 N.C. at 197, 179 S.E.2d at 706. A party ratifies an agreement by retroactively “authoriz[ing] or otherwise approv[ing] [it], . . . either expressly or by implication.” *Black’s Law Dictionary* 1262 (6th ed. 1990). Thus, ratification can occur where a party accepts benefits and performs under an agreement. *See Lowry v. Lowry*, 99 N.C. App. 246, 254, 393 S.E.2d 141, 146 (1990) (wife ratified agreement by signing it, incorporating it into consent judgment, and receiving benefits for three years); *see also Hill v. Hill*, 94 N.C. App. 474, 479, 380 S.E.2d 540, 544 (1989) (wife ratified agreement by monthly accepting from the husband \$1,000.00 and other benefits under an agreement even after she became aware of alleged wrong-

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doing); *Ridings v. Ridings*, 55 N.C. App. 630, 632-33, 286 S.E.2d 614, 616 (husband ratified agreement by paying alimony for four months and accepting title and possession of property transferred under an agreement), *disc. review denied*, 305 N.C. 586, 292 S.E.2d 571 (1982). The act only constitutes ratification if it is done with full knowledge that the acceptance of benefits or the performance arises pursuant to the agreement and is done so without any duress. *See Link*, 278 N.C. at 197, 179 S.E.2d at 706-07; *see also Housing, Inc. v. Weaver*, 37 N.C. App. 284, 300, 246 S.E.2d 219, 228 (1978) (there can be no ratification so long as the duress continues), *aff'd*, 296 N.C. 581, 251 S.E.2d 457 (1979).

A

Full Knowledge

In this case, viewing the evidence in the light most favorable to plaintiff, plaintiff was aware that the \$160,000.00, the various tracts of land, and the truck, all of which she used, were benefits she received under the agreement. Immediately after receiving a check in the amount of \$160,000.00 directly from defendant's firm, plaintiff negotiated the check and invested it into mutual funds. With respect to the various tracts of land she has leased or otherwise encumbered, plaintiff testified in her deposition that she was aware she would be receiving those pursuant to the agreement. There is no evidence in the record that at the time plaintiff encumbered those tracts, she was unaware she possessed them by reason of the agreement. Plaintiff has failed to come forward with any evidence or specific facts showing she did not have full knowledge that the benefits she acquired were by virtue of the agreement. Indeed, the evidence shows plaintiff was using the \$160,000.00 and the tracts of land with full knowledge they were benefits arising under the agreement. While the majority states plaintiff did not understand the agreement, plaintiff testified in her deposition that: she understood what Goodwin meant when he told her he would not pay her alimony; she understood she could have taken the agreement to an attorney for review prior to signing it; and she understood everything she would be receiving and forfeiting under the agreement. Accordingly, I do not believe that Dr. Sultan's affidavit, in light of plaintiff's deposition testimony, creates a genuine issue of fact as to whether plaintiff acted with full knowledge. *See Mortgage Co. v. Real Estate, Inc.*, 39 N.C. App. 1, 9, 249 S.E.2d 727, 732 (1978) (a party cannot file an affidavit contradicting her prior sworn statement in order to create a genuine issue of fact for trial), *aff'd*, 297 N.C. 696, 256 S.E.2d 688 (1979).

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[152 N.C. App. 650 (2002)]

B

Duress

Plaintiff next argues that even if she acted with full knowledge, she was under duress at the time she accepted the benefits under the agreement. I disagree.

In this case, there is no evidence plaintiff accepted the benefits of the agreement while acting under duress. Plaintiff willingly accepted and negotiated the check in the amount of \$160,000.00 and encumbered some of the property acquired under the agreement by using it to secure loans. All of this occurred without any threat or coercion from Goodwin. Even more notable is the fact that after Goodwin's death plaintiff began renting the 117-acre farm, continued to lease the Faulkner tract and the office building, and had the marital home and the 117-acre farm appraised to purchase a home for her daughter. Thus, even if I were to assume plaintiff may have acted under duress at the time she signed the agreement and up until Goodwin's death, there is no evidence in the record to this Court supporting plaintiff's duress after Goodwin's death. Accordingly, I do not believe there is a genuine issue of fact as to whether plaintiff acted under duress while accepting the benefits and performing under the agreement.¹ Therefore, because plaintiff accepted the benefits under the agreement with full knowledge and without duress, she ratified the agreement and thus is precluded from challenging it. I would affirm the trial court's order.

1. I note the affidavits of plaintiff and Dr. Sultan state that plaintiff was afraid to contest the agreement up until Goodwin's death. Plaintiff, in her own deposition, however, stated she told Goodwin she would contest the agreement, she met with a lawyer concerning contesting the agreement, and was in the process of filing a lawsuit to contest the agreement at the time Goodwin died; hence there is no evidence whatsoever that plaintiff was coerced into accepting and using the benefits of the agreement.

SUDDS v. GILLIAN

[152 N.C. App. 659 (2002)]

ROLAND FORD SUDDS, PLAINTIFF-APPELLANT v. PHILLIP RAY GILLIAN, JEROME DOUGLAS EADES, ATLANTIC INDEMNITY COMPANY, AND HORACE MANN INSURANCE COMPANY, DEFENDANT-APPELLEES

No. COA01-998

(Filed 3 September 2002)

1. Release— mutual mistake—not shown

The trial court did not err by granting summary judgment for defendants in an action seeking reformation of a release following an automobile accident where plaintiff did not assert the existence of any fact or term in the release that was incorrect, omitted in error, or misunderstood, and did not allege that either party misunderstood the general meaning or effect of the release.

2. Release— mutual mistake—silence during negotiations— no misrepresentation

The plaintiff in an action seeking reformation of a release was not entitled to summary judgment against a defendant who did not negotiate with him or respond to his inquiries. Plaintiff alleged only that this defendant did not respond to his letters, but did not allege any fact misrepresented by defendant's silence on which plaintiff relied to his detriment.

3. Trials— refusal to review memorandum of law—harmless

The trial court's failure to review plaintiff's written memorandum of law was harmless where the court correctly granted summary judgment for defendant.

Judge GREENE concurring in the result.

Appeal by plaintiff from order entered 23 March 2001 by Judge L. Oliver Noble, Jr., in Catawba County Superior Court. Heard in the Court of Appeals 14 May 2002.

Wyatt Early Harris & Wheeler, by Stanley F. Hammer and William E. Wheeler, for plaintiff-appellant.

Caudle & Spears, P.A., by Eric Allen Rogers, for defendant-appellees Phillip Ray Gillian, Jerome Douglas Eades, and Atlantic Indemnity Company.

Parker, Poe, Adams & Bernstein L.L.P., by Regina J. Wheeler and John Beyer, for defendant-appellee Horace Mann Insurance Company.

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[152 N.C. App. 659 (2002)]

BIGGS, Judge.

Plaintiff appeals from summary judgment entered in favor of defendants. For the reasons that follow, we affirm.

This appeal arises from a three-car collision occurring on 18 July 1996. Plaintiff and Terry McGinness were passengers in a car driven by Brian Shook, which was traveling west along Rural Road 1003 in Catawba County, North Carolina. A second vehicle, driven by Alfred Coe, was traveling east on the same road. When Coe stopped to make a left turn, he was struck from behind by a third car, owned by Jerome Eades and driven by Phillip Gillian. Coe was killed in the collision, and his car was propelled into the opposite lane of traffic where it struck Shook's vehicle. Plaintiff sustained injuries in the accident.

At the time of the accident, Gillian and Eades were insured under an automobile liability policy issued by Atlantic Indemnity Company, with liability limits of \$50,000 per accident. Shook's policy was issued by Nationwide Insurance Company, Inc., and included \$100,000 in underinsured motorist coverage (UIM), which extended to plaintiff as a passenger in Shook's car. Plaintiff also had UIM coverage, under a policy issued by Horace Mann Insurance Company.

On 22 July 1996, plaintiff, Shook, and McGinness retained counsel to represent them jointly in connection with the accident. On 1 April 1998, Atlantic tendered \$23,500 to the three to divide, and on 24 September 1998, Nationwide tendered \$76,500 to the three to divide. On 5 October 1998 plaintiff's counsel wrote to Andrew Holquist, a claims adjuster with Atlantic, on behalf of plaintiff, Shook, and McGinness. Counsel asserted in the letter that his paralegal had spoken with Holquist by phone, and had also left several voice mail messages, repeatedly asking Holquist to send the "Atlantic Casualty checks and releases," but that Holquist had failed to do so. The letter directed Holquist to "please forward the liability payment checks and releases to my office *immediately*." In response, Atlantic forwarded the releases, and plaintiff signed a "Release of All Claims" on 6 November 1998, releasing Gillian, Eades, Atlantic, and "all other persons, firms, corporations, associations or partnerships" from all claims arising out of the accident. A month later, plaintiff's counsel wrote another letter to Holquist, in which he enclosed "the three original Release of All Claims which [had] all been signed by [his] clients, Brian Shook, Roland Sudds [plaintiff], and Terry McGinness respectively."

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On 30 September 1999, plaintiff filed suit against defendants, alleging that the money he had received from Atlantic and Nationwide was insufficient compensation for his injuries. Plaintiff sought reformation of the release “to allow Plaintiff to pursue his claim against Gillian and Eades pursuant to . . . Plaintiff’s [UIM] policy with Horace Mann[.]” He alleged that the release had been executed upon a “mutual mistake of fact.” Gillian, Eades, and Atlantic answered on 23 November 1999, raising the release as a bar to plaintiff’s claim for UIM coverage from Horace Mann, and denying the existence of a mutual mistake. Horace Mann filed an answer on 13 December 1999, also pleading the release as a bar to plaintiff’s claims. Defendants filed a motion for summary judgment on 1 March 2001, which was granted on 23 March 2001. Plaintiff appeals from the trial court’s order granting summary judgment to defendants.

Standard of Review

Summary judgment should be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C.G.S. § 1A-1, Rule 56(c) (2001). “An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action.” *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). “The moving party bears the burden of establishing the lack of a triable issue of fact.” *Sykes v. Keiltex Industries, Inc.*, 123 N.C. App. 482, 484-85, 473 S.E.2d 341, 343 (1996) (citing *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985)). Furthermore, “the evidence presented by the parties must be viewed in the light most favorable to the non-movant.” *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted).

[1] Plaintiff argues first that the trial court erred by granting summary judgment. He asserts specifically that there was a genuine issue of material fact regarding whether plaintiff executed the release pursuant to a mutual mistake of fact, and thus whether the release was subject to reformation. We disagree.

“A release is a ‘formal written statement reciting that the obligor’s duty is immediately discharged.’” *Best v. Ford Motor Co.*, 148 N.C.

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App. 42, 45, 557 S.E.2d 163, 165 (2001) (quoting E. Allan Farnsworth, *Contracts* § 4.24 (2d ed. 1990)), *aff'd*, 355 N.C. 486, 562 S.E.2d 419 (2002) (citation omitted). A release against the principal tortfeasor (negligent driver) also acts to release the UIM insurance carrier, as the liability of a UIM insurance carrier is derivative of the principle tortfeasors' liability. *Grimsley v. Nelson*, 342 N.C. 542, 548, 467 S.E.2d 92, 96 (1996) (signing of release against tortfeasor releases UIM carrier as a matter of law due to "derivative nature of the insurance company's liability"); *Spivey v. Lowery*, 116 N.C. App. 124, 127, 446 S.E.2d 835, 838, *disc. review denied*, 338 N.C. 312, 452 S.E.2d 312 (1994) ("whether or not plaintiff intended to release the UIM carrier is irrelevant . . . [if] plaintiff intended to release the tortfeasor, the UIM carrier is released as well").

An otherwise valid release may be reformed, or re-written, if it was executed pursuant to a mutual mistake of fact. *Metropolitan Property and Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 798, 487 S.E.2d 157, 159 (1997) (defining reformation as an "equitable remedy used to reframe written documents" when, because of a mistake common to both parties, "the written instrument fails to embody the parties' actual, original agreement"). The party seeking reformation must establish both (1) the existence of a mutual mistake of fact, and (2) a resultant failure of the document as executed to reflect the parties' intent. *Suarez v. Food Lion, Inc.*, 100 N.C. App. 700, 705, 398 S.E.2d 60, 63 (1990) (citation omitted).

A mutual mistake exists only when both parties "labor[] under the same misconception respecting a material fact, the terms of the agreement, or the provisions of the written instrument designed to embody such agreement." *Metropolitan Property and Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 798, 487 S.E.2d 157, 159 (1997) (reforming insurance policy where both parties intended to insure plaintiff's house, but both were mistaken as to the street address of the property). However, the unilateral "mistake of only one party to the instrument, if such mistake was not induced by the fraud of the other party, affords no ground for relief by reformation." *Light v. Equitable Life Assur. Society*, 56 N.C. App. 26, 32, 286 S.E.2d 868, 872 (1982) (citing *Parker v. Pittman*, 18 N.C. App. 500, 197 S.E.2d 570 (1973)). See also *Mock v. Mock*, 77 N.C. App. 230, 334 S.E.2d 409 (1985) (no grounds for reformation when parents mistakenly included former daughter-in-law's name on deed, where no evidence exists that both parties intended for her name to be omitted). Further, "reformation on grounds of mutual mistake is available only where the evidence is

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clear, cogent and convincing." *Durham v. Creech*, 32 N.C. App. 55, 59, 231 S.E.2d 163, 166 (1977).

In the case *sub judice*, plaintiff signed a release that expressly releases Gillian, Eades, and Atlantic from further liability in regards to the accident, in exchange for his share of Atlantic's policy limit. In addition, the document releases "all other persons, firms, corporations, associations or partnerships." Horace Mann was plaintiff's UIM insurance carrier; therefore, plaintiff's execution of a general release of Gillian and Eades generally serves as a matter of law to release Horace Mann, irrespective of plaintiff's intentions.

Plaintiff, however, alleges that the release was executed pursuant to a mutual mistake of fact, and should therefore be reformed. In support of this contention, plaintiff's attorney executed an affidavit alleging that: (1) the letter requesting a release was written by his paralegal; (2) he "did not personally review the letter prior to its mailing to Holquist;" (3) he "did not review" the release before it was forwarded to his client to be signed; and (4) he did not review the signed release for "many months" until "it was ultimately brought to [his] attention." Plaintiff essentially alleges that his counsel mistakenly requested the release on his behalf, mistakenly directed plaintiff to execute the release, and mistakenly returned it to Atlantic, and asserts that these circumstances demonstrate that "[counsel's] request for 'liability payment checks and releases' is a mistake which warrants reformation." Defendants argue that the affidavit alleges only unilateral error, and does not provide grounds for reformation. We agree with defendants.

Plaintiff does not assert the existence of any fact or term in the release that is incorrect, was omitted in error, or whose legal import was misunderstood by both parties. Nor does he allege that either party misunderstood the general meaning or effect of the release. We conclude that plaintiff has alleged only his unilateral mistakes, and that, viewing the evidence in the light most favorable to plaintiff, no genuine issue of fact exists as to whether the release was executed pursuant to a mutual mistake of fact.

Plaintiff also argues that the evidence raises a genuine issue of fact regarding whether the release as executed was contrary to the mutual intent of the parties. However, because we conclude plaintiff has not shown the existence of any mutual mistake of fact, we find it unnecessary to determine the parties' respective intentions with regard to the release. See *Suarez v. Food Lion, Inc.*, 100 N.C. App.

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700, 705, 398 S.E.2d 60, 63 (1990) (“Equity will give relief by reformation only when a mistake has been made, and the written instrument, *because of the mistake*, does not express the true intent of both parties.”) (emphasis added); *Parker v. Pittman*, 18 N.C. App. 500, 504, 197 S.E.2d 570, 573 (1973) (“If a [document] fails to express the true intention of the parties it may be reformed to express such intent only when the failure is due to the mutual mistake of the parties[.]”).

We conclude that the evidence taken in the light most favorable to plaintiff fails to establish that the release was executed under a mutual mistake or misunderstanding regarding a material fact. This assignment of error is overruled.

[2] Plaintiff also argues that although he did not move for summary judgment, he is entitled to judgment in his favor as regards defendant Horace Mann. He contends that Horace Mann failed to negotiate with plaintiff or to respond to his inquiries, and therefore that “Horace Mann should be estopped to contest the reformation of the release.” We disagree.

The doctrine of equitable estoppel is properly applied when “an individual . . . induces another to believe that certain facts exist and that other person rightfully relies on those facts to his detriment.” *Bunn Lake Property Owner’s Ass’n, Inc. v. Setzer*, 149 N.C. App. 289, 297, 560 S.E.2d 576, 582 (2002) (citation omitted). The trial court “may only grant a summary judgment motion based on the doctrine of estoppel ‘[w]here there is but one inference that can be drawn from the undisputed facts of a case.’ ” *Tuckett v. Guerrier*, 149 N.C. App. 405, 412, 561 S.E.2d 310, 314 (2002) (quoting *Keech v. Hendricks*, 141 N.C. App. 649, 653, 540 S.E.2d 71, 75 (2000)).

In the case *sub judice*, plaintiff alleges only that Horace Mann did not respond to plaintiff’s letters informing it of his settlement negotiations with other insurers. However, plaintiff fails to assert the existence of any fact that Horace Mann allegedly misrepresented by its silence, upon which plaintiff relied to his detriment. This assignment of error is overruled.

[3] Finally, plaintiff argues that the trial court erred by failing to consider his written memorandum of law opposing the grant of summary judgment. Having determined that the trial court’s ruling was legally correct, we necessarily determine that any error in the trial judge’s failure to review plaintiff’s memorandum, was harmless.

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For the reasons discussed above, we conclude that plaintiff presented no grounds upon which to reform the release. We conclude that defendants were entitled to summary judgment as a matter of law, and, accordingly, the order of the trial court is

Affirmed.

Judge GREENE concurs with separate opinion.

Judge HUDSON concurs.

GREENE, Judge, concurring in the result.

While I agree with the majority that no genuine issue of fact exists with regard to the execution of the release under circumstances amounting to mutual mistake, I write separately to clarify when a release may be avoided.

A release can be avoided upon a “showing that its execution resulted from . . . mutual mistake of fact.” *Cunningham v. Brown*, 51 N.C. App. 264, 269, 276 S.E.2d 718, 723 (1981). A mistake of fact occurs, affording reformation, if a release fails “to accomplish the result intended by both parties.” *Id.* at 273-74, 276 S.E.2d at 726. Thus, if there is evidence permitting a finding that the parties to a release intended to release only certain parties, but the release actually contains “language contrary to this mutual agreement and intention in that by its terms it release[s] other[s]” as well, a genuine issue of fact is raised precluding entry of summary judgment. *Id.* at 273, 276 S.E.2d at 726.

In this case, viewing the evidence in the light most favorable to plaintiff, no genuine issue of fact exists as to whether the release was executed under circumstances amounting to a mutual mistake of fact. Indeed, the evidence shows the release was executed pursuant to plaintiff’s unilateral mistake of fact.

MIDGETT v. N.C. DEP'T OF TRANSP.

[152 N.C. App. 666 (2002)]

LELAND MIDGETT, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, EMPLOYER, SELF-INSURED (KEY RISK MANAGEMENT, SERVICING AGENT), DEFENDANT

No. COA01-1081

(Filed 3 September 2002)

Tort Claims Act— Jones Act—injury to seaman—sovereign immunity

The Industrial Commission did not err by dismissing plaintiff employee seaman's claim for injuries against defendant employer Department of Transportation based on lack of jurisdiction under the Tort Claims Act, because the State has not waived its sovereign immunity to Jones Act claims under 46 U.S.C. 688, a federal statute which governs recovery for injury to seamen.

Appeal by plaintiff from an Order of the Full Commission entered on 5 June 2001. Heard in the Court of Appeals 4 June 2002.

Attorney General Roy Cooper, by Assistant Attorney General Amar Majmundar, for the State.

The Twiford Law Firm, L.L.P., by Branch W. Vincent, III, for plaintiff-appellant.

HUDSON, Judge.

The plaintiff appeals an Order of the Industrial Commission dismissing his claim against his employer, the N.C. Department of Transportation ("DOT"), for lack of jurisdiction under the Tort Claims Act. We affirm.

Plaintiff was employed by the DOT as a seaman aboard the M/V Kinnakeet, a ferry boat transporting motor vehicles and passengers between Hatteras Island and Ocracoke Island. On the morning of 4 July 1995, plaintiff slipped and fell on the deck of the Kinnakeet, injuring his back. According to the report filed by the plaintiff's investigating supervisor E.M. Farrow, the accident occurred because the deck was wet from a rain shower. In addition, the wrong paint had been applied to the deck of the vessel, so that instead of a rough, non-skid finish, the deck had a slick finish.

The plaintiff filed a claim under the Workers' Compensation Act, N.C. Gen. Stat. §§ 97-1 to 97-200 (2001); the claim was settled

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by a compromise settlement agreement between the parties. The agreement was approved by the Industrial Commission on 25 September 1997.

The plaintiff then filed this claim against the DOT under the Tort Claims Act, N.C. Gen. Stat. §§ 143-291 to 143-300.1 (2001), which authorizes claims against the State for injuries due to negligence if they arose “under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.” N.C.G.S. § 143-291(a). The plaintiff contended that although his claim was filed under the Tort Claims Act, it stems from the Jones Act, 46 U.S.C. 688 (2001), a federal statute which governs recovery for injury to seamen. The State filed a motion to dismiss, asserting: (1) that plaintiff failed to state a claim upon which relief can be granted under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (2001), because the State has not waived sovereign immunity for Jones Act claims; (2) that the plaintiff has already recovered through his exclusive remedy for his injury under the Workers’ Compensation Act, so that this claim is barred; and (3) that even if the plaintiff stated a claim under the Tort Claims Act, he failed to allege negligence on the part of a named employee of the defendant as required by N.C. Gen. Stat. § 143-291 and § 143-297(2) (2001). Deputy Commissioner William C. Bost of the Industrial Commission entered an order dismissing the claim without specifying the grounds. The defendant appealed to the Full Commission arguing only the lack of subject matter jurisdiction due to sovereign immunity. The Commission entered an order discussing the issue at some length, and concluding, in pertinent part, that the matter was not properly before it because:

[t]he North Carolina Department of Transportation is an agency of the state and cannot be sued except as provided by statute and may be sued in tort only as authorized by the Tort Claims Act. Although granted jurisdiction to hear claims brought under the North Carolina Tort Claims Act, the General Assembly has not waived sovereign immunity for Jones Act claims and therefore has not granted the Industrial Commission jurisdiction over Jones Act claims.

(internal citations omitted). The Full Commission dismissed the claim for lack of subject matter jurisdiction. The plaintiff appeals.

The plaintiff assigns error to the Industrial Commission’s conclusion that the Commission lacked jurisdiction over his claim. Typically

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findings of fact in final decisions on appeal to this Court from the Industrial Commission are binding upon this Court if supported by any competent evidence. *See* N.C. Gen. Stat. § 143-293 (2001); *see also* *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). However, a determination of jurisdiction is not binding upon this Court, and “any reviewing court, including the Supreme Court, has the duty to make its own independent findings of jurisdictional facts from its consideration of the entire record.” *Dowdy v. Fieldcrest Mills*, 308 N.C. 701, 705, 304 S.E.2d 215, 218 (1983) (citing *Lucas v. Stores*, 289 N.C. 212, 221 S.E.2d 257 (1986)), *reh'g denied*, 311 S.E.2d 590 (1984). Upon consideration of the entire record, we hold that the Industrial Commission has no jurisdiction over this claim because the State has not waived its sovereign immunity to Jones Act claims. The doctrine of sovereign immunity “protects the State and its agencies from suit absent waiver or consent.” *Wood v. N.C. State Univ.*, 147 N.C. App. 336, 338, 556 S.E.2d 38, 40 (2001). *disc. rev. denied*, 355 N.C. 292, 561 S.E.2d 887 (2002). Unless waived, “the immunity provided by the doctrine [of sovereign immunity] is absolute and unqualified.” *Price v. Davis*, 132 N.C. App. 556, 559, 512 S.E.2d 783, 786 (1999) (internal citations and quotations omitted). The State waives immunity when the General Assembly grants statutory authority to be sued, but may then “be sued only in the manner and upon the terms and conditions prescribed.” *Alliance Co. v. State Hospital*, 241 N.C. 329, 332, 85 S.E.2d 386, 389 (1955) (internal citations and quotations omitted). Statutes which authorize suit against the State, “being in derogation of the sovereign right to immunity, must be strictly construed.” *Guthrie v. State Ports Authority*, 307 N.C. 522, 538, 299 S.E.2d 618, 627 (1983).

The Tort Claims Act constitutes such a specific statutory waiver of immunity. In part, it provides:

The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant *in accordance with the laws of North Carolina*. If

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the Commission finds that there was such negligence on the part of an officer, employee, involuntary servant or agent of the State . . . and that there was no contributory negligence on the part of the claimant . . . the Commission shall determine the amount of damages which the claimant is entitled to be paid, including medical and other expenses, and by appropriate order direct the payment of such damages.

N.C.G.S. § 143-291(a) (emphasis added).

Prior to the original enactment of the Tort Claims Act in 1951, the State Highway Commission, now the DOT, was immune from all liability for ordinary negligence. *See Givens v. Sellars*, 273 N.C. 44, 159 S.E.2d 530 (1968). Since the passage of the Act, an injured person has been able to proceed in tort against the DOT, in the manner provided in the Act. *See Davis v. Highway Commission*, 271 N.C. 405, 156 S.E.2d 685 (1967). Such claims proceed according to North Carolina common law principles in the Industrial Commission. *See MacFarlane v. Wildlife Resources Com.*, 244 N.C. 385, 93 S.E.2d 557 (1956).

Plaintiff filed this tort claim in the Industrial Commission alleging that the DOT is liable to him under the Jones Act, which states, in part, that:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

46 U.S.C.A. 688 (2001). He contends that there is nothing in the Tort Claims Act which prohibits an injured person from pursuing a claim based on liability under this federal statute. Although this precise issue has not been addressed by our state appellate courts, the related cases lead us to disagree.

The Tort Claims Act expressly states that the State may be liable only in "circumstances where the State of North Carolina, if a private person, would be liable to the claimant *in accordance with the laws of North Carolina*." N.C.G.S. § 143-291(a) (emphasis added). The Tort

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Claims Act specifically codifies and automatically raises the defense of contributory negligence in each claim:

Contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted shall be deemed to be a matter of defense on the part of the State department, institution or agency against which the claim is asserted, and such State department, institution or agency shall have the burden of proving that the claimant or the person in whose behalf the claim is asserted was guilty of contributory negligence.

N.C. Gen. Stat. § 143-299.1 (2001). The Industrial Commission determines how to apply substantive contributory negligence law, however, by resorting to North Carolina common law. As the Full Commission noted here, “[the Jones] Act applies the standard of comparative negligence.” *See also Socomy-Vacuum Oil Company v. Smith*, 305 U.S. 424, 431, 83 L. Ed. 265, 270 (1939). Thus, an employer who would be liable to a partially negligent claimant under the Jones Act, would not be liable to the same claimant “in accordance with the laws of North Carolina,” because of the state law doctrine of contributory negligence.

The plaintiff argues that the Court’s decision in *Parsons v. Board of Education* implies that the Commission may entertain a tort claim that is based on law other than that of the state of North Carolina. *See Parsons v. Board of Education*, 4 N.C. App. 36, 165 S.E.2d 776 (1969). There, this Court affirmed a decision of the Industrial Commission which applied the substantive law of Virginia in a tort claim against the State of North Carolina. *See id.* The claim arose out of a collision between a North Carolina school bus and an automobile in Virginia. *See id.* at 39, 165 S.E.2d at 778. This Court applied the doctrine of *lex loci*, itself arising from North Carolina common law, to decide that the substantive rights and liabilities of the parties would be determined under Virginia law. *See id.* Although the decision applied the substantive law of Virginia, the procedural matters were controlled by the law of North Carolina. *See id.* The Court in *Parsons* did not expressly expand the jurisdiction of the Industrial Commission to hear claims brought under Virginia law, absent the application of *lex loci*. *See id.* In fact, the issue was not raised. We do not believe that *Parsons* can be read to expand the jurisdiction of the Commission to tort claims based entirely on federal law, particularly where, as here, the basis for liability (comparative negligence under the Jones Act) is inconsistent with state law. Under these circumstances, we do not

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believe that *Parsons* or the express language of the Tort Claims Act supports such jurisdiction. *See id.*

We agree with plaintiff that the Tort Claims Act does not specifically prohibit Jones Act claims. However, as we have noted, the General Assembly must specifically waive sovereign immunity before one can pursue a claim against an agency of the State. *See, e.g., Turner v. Board of Education*, 250 N.C. 456, 109 S.E.2d 211 (1959). The Supreme Court stated in *Orange County v. Heath* that:

As we understand the rule relating to the immunities attaching to sovereignty, such attributes are never to be considered as waived or surrendered by any inference or implication. The surrender of an attribute of sovereignty being so much at variance with the commonly accepted tenets of government, so much at variance with sound public policy and public welfare, the Courts will never say that it has been abrogated, abridged, or surrendered, except in deference to plain, positive legislative declarations to that effect.

Orange County v. Heath, 282 N.C. 292, 296, 192 S.E.2d 308, 310-11 (1972) (internal quotations and citations omitted)).

We also believe that plaintiff's reliance upon *Welch v. Texas Dept. of Highways & Public Transp.*, 483 U.S. 468, 97 L. Ed. 2d 389 (1987) is inapposite. In *Welch*, the plaintiff, an employee of the Texas Department of Highways and Public Transportation, was injured on a automobile and passenger ferry dock. *See id.* at 471, 97 L. Ed. 2d. at 394. She filed suit under the Jones Act against the state of Texas in federal district court. *See id.* at 471, 97 L. Ed. 2d. at 394-95. The District Court for the Southern District of Texas dismissed the claim as barred by the Eleventh Amendment, and the Fifth Circuit Court of Appeals subsequently affirmed. *See id.* at 471, 97 L. Ed. 2d at 395. Although the United States Supreme Court subsequently affirmed the dismissal from federal court, it declined to consider the question of whether the Texas Tort Claims Act waived the state's sovereign immunity. *See id.* at 474, 97 L. Ed. 2d. at 397. Plaintiff argues that by not addressing the issue, the United States Supreme Court implied that states might be subject to suit in state court by private parties bringing claims based on the Jones Act. We do not agree, and the United States Supreme Court has recently addressed the issue in *Federal Maritime Com. v. SCSPA*, 535 U.S. —, 152 L. Ed. 2d 962 (2002). There, the United States Supreme Court held that "even when the Constitution vests in Congress complete lawmaking authority

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over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.” *Id.* at —, 152 L. Ed. 2d at 982 (citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72, 134 L. Ed. 2d 252, 277 (1996)). In *Alden v. Maine*, 527 U.S. 706, 144 L. Ed. 2d 636 (1999), where the Supreme Court similarly held that sovereign immunity shields States from private suits in state courts pursuant to federal causes of action, the Court further held that statutory waiver of immunity to some claims did not constitute consent to suit in all cases. “To the extent [a State] has chosen to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit.” *See id.* at 758, 144 L. Ed. 2d at 680-81.

Further, as stated by the North Carolina Supreme Court in *Orange County v. Heath*, even if the Court had implied that states could waive immunity to Jones Act claims in state court, such an implication would not be sufficient to waive the State’s immunity in this case. *See Orange County*, 282 N.C. at 296, 192 S.E.2d at 310-11. The Court stated that

[t]he State and its governmental units cannot be deprived of the sovereign attributes of immunity except by a clear waiver by the lawmaking body. The concept of sovereign immunity is so firmly established that it should not and cannot be waived by indirection or by procedural rule. Any such change should be by plain, unmistakable mandate of the lawmaking body.

Id. at 296, 192 S.E.2d at 310. Here, the General Assembly did not by “plain, unmistakable mandate” waive the State’s immunity to suit under the Jones Act in a tort claim. The Industrial Commission therefore lacked jurisdiction, and properly dismissed the plaintiff’s claim.

Defendants also argued in the Industrial Commission and in their brief to this Court that this claim is barred by the exclusive remedy provisions of the Workers’ Compensation Act. *See N.C. Gen. Stat. §97-10.1* (2001). Because of our holding on sovereign immunity, we do not reach this issue.

Affirmed.

Judges GREENE and BIGGS concur.

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[152 N.C. App. 673 (2002)]

PATRICIA MARILYN HONEYCUTT, PLAINTIFF v. WALLACE B. HONEYCUTT,
DEFENDANT

No. COA01-1008

(Filed 3 September 2002)

1. Divorce— alimony—dependent spouse—permanently adjudicated at initial hearing

In an order terminating alimony, the trial court improperly concluded that defendant was no longer a dependent spouse because that issue was permanently adjudicated during the initial alimony hearing. The court may reduce the amount of alimony to zero if a change of circumstances is found to exist.

2. Divorce— alimony—earning capacity—not investment potential or social security

The findings in an order terminating alimony did not address plaintiff's earning capacity where they referred to potential investment income and social security rather than earning capacity from working.

Judge GREENE concurring in part and dissenting in part.

Appeal by plaintiff from order entered 6 December 2000 by Judge Mark S. Culler in Iredell County District Court. Heard in the Court of Appeals 21 May 2002.

White and Crumpler, by Fred G. Crumpler, Jr. and Laurie Schlossberg Kelly, and Jane S. Atkins & Associates, P.A., by Jane S. Atkins and Elizabeth A. Stephenson, for plaintiff-appellant.

Woodruff & Associates, P.A., by Carolyn J. Woodruff, for defendant-appellee.

HUDSON, Judge.

Plaintiff, Patricia Marilyn Honeycutt, appeals an order entered 6 December 2000 terminating her ex-husband's obligation to pay alimony. We reverse and remand for further proceedings.

Plaintiff married defendant, Wallace B. Honeycutt, in 1956. They separated July 1989, and divorced September 1990. Before the divorce was final, plaintiff filed a verified complaint seeking ali-

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mony, “reasonable support, maintenance and subsistence,” possession of the marital home in addition to its furnishings, attorney’s fees, and equitable distribution of the marital property. On 12 November 1991, the trial court entered a Judgment of Equitable Distribution and Qualified Domestic Relations Order, which distributed the couple’s property and gave the marital home to plaintiff. Following a jury trial on the issue of fault, the trial court entered an Alimony Judgment on 31 January 1992 finding among other things that plaintiff was a dependent spouse pursuant to N.C. Gen. Stat. § 50-16.1(3) (1995), that defendant was a supporting spouse pursuant to N.C. Gen. Stat. § 50-16.1(4) (1995), and that defendant was capable of financially supporting plaintiff. Defendant was ordered to pay alimony of \$3,261.74 per month to plaintiff “until the death of either party, or the remarriage of the plaintiff, whichever event should first occur.” The court also decreed that “this Order may be reviewed as to permanent Alimony, upon finalization of the equitable distribution action.”

On 9 December 1998, defendant filed a motion to reduce his alimony payments to plaintiff on the grounds that there was a “substantial change of circumstances” in that he was in the process of selling his dental practice and would soon retire. Plaintiff filed a motion to increase defendant’s alimony payments, because she contended that he was enjoying an increase in income from rental property, from the sale of his dental practice, and from annuity contracts, in addition to his annual income as a dentist. The record does not indicate whether either of these motions were heard. The parties entered a Consent Judgment on 9 March 2000, resolving all outstanding equitable distribution issues.

On 2 August 2000, defendant filed a motion to terminate his alimony payments to plaintiff, citing a “substantial material change in circumstances in addition to the change contemplated by the alimony judgment entered in 1992.” Defendant noted the following changes in circumstance:

a. [Defendant] is now age 66 and [plaintiff] is now age 65. Both are receiving social security and both are or should be now receiving Medicare.

b. The defendant [] has no regular employment and is retired.

4. [Defendant] no longer has a monthly income from his practice.

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a. In equitable distribution, [defendant] divided the retirement plans with [plaintiff] fifty-fifty.

b. The needs of [plaintiff] have materially declined since the hearing in 1991 in that she now has a paid for home, paid for automobile, Medicare, upon information and belief no household help and her medical bills are less.

c. [Plaintiff] has adequate investments along with her social security to provide for her needs and her "paid for" home and with her "paid for" automobile and Medicare.

[Plaintiff] has the luxury of living in a 5000 square foot "paid for" residence containing five bedrooms and she could easily downsize her residence to a more suitable size for a person in retirement age should she need additional resources.

Defendant also filed an alternative motion to terminate his alimony payments, relying on the trial court's earlier order that alimony could be reviewed as soon as the equitable distribution claim was finalized. Plaintiff replied to both motions, and in response to the alternative motion contended that "the Alimony Judgment is a judgment awarding the plaintiff permanent alimony from the defendant."

On 6 December 2000, the trial court concluded that the previous alimony judgment was an "Order of 'permanent alimony' but did not consider the amount of alimony to be a fully determined issue." The trial court further concluded that according to the previous judgment, "neither party was to be required to demonstrate changed circumstances in order for the Court to adjust the actual amount of the alimony payment." However, the trial court concluded, that because nine years had passed since entry of the alimony judgment, and since the property was equitably distributed (except for one piece of property), defendant "has the burden of demonstrating changed circumstances both for purposes of requesting that the Court terminate alimony altogether on the theory that [plaintiff] is no longer dependent and for purposes of requesting that, absent termination, the award be reduced." The trial court held that defendant met his burden of proving changed circumstances, that plaintiff was "no longer a dependent spouse," and terminated alimony payments effective 2 October 2000.

Plaintiff appeals this Order and in her sole argument contends that "the trial court erred in terminating [defendant's] obligation to pay alimony to [plaintiff] on the grounds that said ruling is not sup-

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ported by proper findings of facts or conclusions of law.” She points to two alleged legal errors in the trial court’s order: (1) the conclusion that she is no longer a dependent spouse, and (2) findings and conclusions that she has a certain earning capacity. We note that the applicable alimony statutes, N.C. Gen. Stat. §§ 50-16.1 *et seq.*, were amended in 1995. “Session Laws 1995 . . . provides that the act applies to civil motions filed on or after that date, and shall not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995.” N.C.G.S. § 50-16.1 (1995) (editor’s note). The original action was filed prior to 1995, and the statute and applicable case law from before the 1995 amendments govern. *See id.*

[1] We first address whether the trial court properly concluded that plaintiff is no longer a dependent spouse. Pursuant to N.C. Gen. Stat. § 50-16.9(a) (1987), “[a]n order of a court of this State for alimony or alimony pendente lite, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.” Here, the defendant had the burden of showing a change of circumstances to support his motion to decrease alimony. “Even where the moving party has met [his] burden to show relevant changed circumstances, however, the trial court is not required to modify an alimony award, but may do so in its discretion.” *Kowalick v. Kowalick*, 129 N.C. App. 781, 785, 501 S.E.2d 671, 674 (1998) (citing *Robinson v. Robinson*, 10 N.C. App. 463, 468, 179 S.E.2d 144, 148 (1971)).

“To determine whether a change in circumstances under G.S. 50-16.9 has occurred, it is necessary to refer to the circumstances or factors used in the original determination of the amount of alimony awarded under G.S. 50-16.5.” *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982), *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 489 (1985). Although now repealed, N.C. Gen. Stat. § 50-16.5 (1987), entitled “Determination of amount of alimony,” requires the consideration of the “estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case” in setting the amount of alimony. *See also Rowe*, 305 N.C. at 187, 287 S.E.2d at 846. However, the trial court may not reconsider the issue of whether the Plaintiff is a dependent spouse, because it was “permanently adjudicated” during the initial alimony hearing. *See Rowe*, 305 N.C. at 187, 287 S.E.2d at 846.

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Here, the trial court improperly concluded that plaintiff “is no longer a dependent spouse,” because the trial court determined that relative status of the parties permanently as of the date of the original order. *See id.* Subsequent to that order, the court may consider only “whether any change of circumstances justified a modification or termination of the alimony order.” *Cunningham v. Cunningham*, 345 N.C. 430, 437, 480 S.E.2d 403, 407 (1997). “We note that the trial court may, if a change in circumstances is found to exist, reduce the amount of alimony to zero, but such modification does not result in the loss of dependent spouse status.” *Kowalick*, 129 N.C. App. at 786, 501 S.E.2d at 675.

“On remand, the trial court should make findings showing its consideration of the [N.C.G.S. §] 50-16.5 factors on which the parties have presented competent evidence.” *Id.* at 787, 501 S.E.2d at 675. However, we note that findings 7 and 8 contain provisions which are not supported by the evidence or which are not consistent with the law. The court is not to calculate plaintiff’s expenses based on what they would be if she sold her home and moved to a smaller one, without taking into account the cost of such a move, and the resultant lessening of plaintiff’s standard of living. In addition, we do not believe the evidence supports the finding that plaintiff’s expenses “should be reduced by \$239.16 for medical insurance since Plaintiff is now eligible for Medicare.” The record reflects that plaintiff’s health care costs are for supplemental insurance to cover health care needs and prescription medications which Medicare does not cover. The record reflects no reason for the court to require her to lessen her standard of living by reducing the quality or availability of health care in this manner. To the contrary, the record reflects that by carrying this insurance, the plaintiff has taken reasonable steps to provide for her known health care needs. We remand for the trial court to make new findings and conclusions consistent with this opinion.

[2] However, plaintiff raises a second challenge to the conclusions of law. Plaintiff argues that the trial court erred in “considering [her] earning capacity,” as opposed to her actual earnings, without first determining that she “was intentionally, in bad faith, suppressing her actual income.” The statute in effect at the time of this claim specifically required the court to consider the income and earning capacity of the parties, among other factors that may be considered, and here the conclusion makes reference to “earning capacity.” The findings on which this conclusion is based refer to potential investment income and social security, rather than earning capacity from working, as the

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term is typically used. Thus, as we do not believe the court's findings address plaintiff's "earning capacity," we need not address this issue further.

Reversed and remanded for further findings consistent with this opinion.

Judge BIGGS concurs.

Judge GREENE concurs in part and dissents in part.

GREENE, Judge, concurring in part and dissenting in part.

I agree with the majority as to the first part of its opinion holding that the trial court erred in concluding plaintiff was no longer a dependent spouse. The majority opinion, however, also holds that the trial court's findings do not discuss plaintiff's earning capacity and thus this Court need not address the question whether the trial court erred in failing to make a finding as to plaintiff's bad faith. As to this part of the opinion, I dissent.

According to pre-1995 case law, "an award of alimony may be based upon [a] spouse's ability to earn as distinguished from [her] actual income . . . only when it appears from the record that there has been a deliberate attempt on the part of the . . . spouse to avoid [her] financial family responsibilities." *Bowes v. Bowes*, 287 N.C. 163, 171-72, 214 S.E.2d 40, 45 (1975); *Spencer v. Spencer*, 70 N.C. App. 159, 171, 319 S.E.2d 636, 645 (1984) (in order to use earning capacity, the trial court must make a "finding that the reduction in income was primarily motivated by a desire to avoid . . . reasonable support obligations"). "Absent such a finding, the trial court must determine alimony based on [a spouse's] income alone, not [her] earning capacity." *Spencer*, 70 N.C. App. at 171, 319 S.E.2d at 645.

In this case, the trial court concluded that "[i]n light of the fact . . . the individual estates, earnings, earning capacities, and conditions of the parties have changed substantially and . . . [plaintiff] is presently capable of supporting and maintaining herself . . . without any assistance from . . . [d]efendant," it was terminating defendant's spousal support obligations. The trial court's findings on which this conclusion is based include expert testimony regarding plaintiff's

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potential investment income.¹ Reliance on this testimony, which essentially speaks to plaintiff's earning capacity, would be error without an additional finding of bad faith on her part.² See *Bowes*, 287 N.C. at 171-72, 214 S.E.2d at 45; *Spencer*, 70 N.C. App. at 171, 319 S.E.2d at 645. Moreover, in ascertaining plaintiff's actual investment income for purposes of alimony, the trial court must consider "[t]he value of property within a reasonable time before or after the commencement of [the present] action." *Clark v. Clark*, 301 N.C. 123, 135, 271 S.E.2d 58, 67 (1980). As the order does not reflect the extent, if any, to which the trial court relied on the expert testimony regarding plaintiff's investment income, I would remand this issue to the trial court for findings consistent with this opinion.

STATE OF NORTH CAROLINA v. DAVID RAY PHILLIPS

No. COA01-1236

(Filed 3 September 2002)

1. Criminal Law— in personam jurisdiction—inability to limit appearance for purposes of challenging jurisdiction

The trial court did not lack in personam jurisdiction in a failure to produce a driver's license case even though defendant alleges invalid service of process and the fact that he limited his appearances for the purposes of challenging jurisdiction, because: (1) defendant has failed to set forth any criminal case or statute providing a criminal defendant with the right to limit his appearance at trial in order to challenge jurisdiction; and (2) the record reveals that defendant was lawfully served by the county district attorney with a misdemeanor statement of charges.

2. Constitutional Law— right to counsel—advice of non-lawyer not included

The trial court did not err in a failure to produce a driver's license case by allegedly denying defendant his counsel of choice,

1. It must be noted that plaintiff is sixty-five years old and not employed. Consequently, she does not derive any income from work.

2. It is true that, as the majority states, earning capacity is typically used in reference to a person's occupation; however, the concept is equally applicable where a trial court imputes income to a spouse based on the earning capacity of her investment portfolio, which, if used more effectively, could yield a higher return.

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namely the advice of a non-lawyer, because there is no Sixth Amendment right to be represented by a non-attorney.

3. Motor Vehicles—reckless driving—failure to produce license—uniform citation—misdemeanor statement of charges

Defendant was properly charged and tried for misdemeanor offenses of reckless driving and failure to produce a driver's license where the offenses were committed in the officer's presence; the officer issued defendant a uniform citation for those offenses; the officer took defendant before a magistrate who found that probable cause existed; and defendant objected to service by criminal citation and was then served with a statement of charges by an assistant district attorney pursuant to N.C.G.S. §§ 15A-303(a) and 15A-922(a).

4. Constitutional Law—right to counsel—voluntary waiver

The trial court did not err in a failure to produce a driver's license case by imposing a jail sentence even though defendant contends it was absent a voluntary waiver of counsel, because: (1) defendant unequivocally refused to have a lawyer represent him; (2) defendant understood the applicable law; and (3) the only thing that defendant did not understand was that "attorney" and "assistance of counsel" are one and the same.

5. Criminal Law—failure to ask defendant for plea before jury empaneled—no undue prejudice

The trial court did not err in a failure to produce a driver's license case by failing to ask defendant for a plea before the jury had been empaneled, because: (1) defendant failed to cite any legal authority for this proposition and even if the trial court should have requested the plea earlier, the trial court corrected the situation by asking defendant for the plea; (2) defendant knew the charges against him; and (3) defendant failed to show any undue prejudice from the trial court's proceedings.

Appeal by defendant from judgment entered 2 April 2001 by Judge William Z. Wood, Jr., in Yadkin County Superior Court. Heard in the Court of Appeals 22 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General Kristine L. Lanning, for the State.

David Ray Phillips, defendant appellant, pro se.

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[152 N.C. App. 679 (2002)]

McCULLOUGH, Judge.

Defendant David Ray Phillips was tried before a jury at the 30 March 2001 Criminal Session of Yadkin County Superior Court. Defendant had appealed convictions in district court of reckless driving and failure to produce his driver's license.

Evidence for the State tended to show that on 26 July 2000, Trooper R. D. Holbrook of the North Carolina Highway Patrol was working at a roadblock in Yadkin County. At approximately 8:40 p.m., he observed a white pick-up truck, which was later determined to be driven by defendant, pulling off on the side of the road ahead of the roadblock. He then observed the truck make a U-turn in front of another vehicle, nearly causing an accident, and proceed away from the roadblock. The trooper left the roadblock and pulled the vehicle over. He requested to see the operator's license and registration, at which time defendant handed the trooper a card that purported to invoke his Fifth Amendment rights. (For full text of the card, *see State v. Phillips*, 149 N.C. App. 310, 560 S.E.2d 852, *appeal dismissed*, 355 N.C. 499, 564 S.E.2d 230 (2002).) Defendant repeatedly refused the trooper's requests for his license and registration. Trooper Holbrook informed defendant that if he did not produce his license, he would break his vehicle window and remove defendant from the vehicle. Eventually, defendant exited the vehicle and was placed under arrest for reckless driving and failure to produce a driver's license.

At the trial court level, defendant was found not guilty of the reckless driving charge but guilty of the failure to produce a driver's license by a jury on 2 April 2001. Defendant was determined to have a prior record level II, and was sentenced to a term of 45 days, which was suspended for a 36-month period of supervised probation. Defendant was ordered to pay a \$500 fine, court costs, complete 100 hours of community service, surrender his driver's license for 120 days, and lose his right to possess a firearm off his premises. In addition, defendant was sentenced to 30 days for criminal contempt. Judge Wood offered to reduce defendant's sentence for contempt to 3 days, which defendant accepted. However, defendant later informed the trial court that he was refusing to serve his probationary sentence, and opted to serve his active sentence.

Defendant brings forth the following assignments of error: The trial court erred in (1) failing to grant defendant's pretrial sworn demand to dismiss for want of subject matter/*in personam* jurisdiction; (2) failing to grant defendant's motion to dismiss for lack of sub-

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ject matter jurisdiction and the court's exercise of subject matter/*in personam* jurisdiction; (3) the exercise of subject matter/*in personam* jurisdiction as it related to defendant by failing to grant defendant's motion to dismiss as no duly enacted law conferred jurisdiction over an "unenfranchised" state citizen; (4) denying defendant's notice and demand for right to counsel of choice; (5) failing to grant defendant's motion to dismiss for failure to state a claim upon which relief can be granted and reject as insufficient on its face the unsworn document used to prosecute defendant; (6) accepting pleadings filed by an executive officer in the name of the State and on behalf of the District Attorney; (7) failing to have a probable cause hearing; (8) imposing a jail sentence absent a willing, intelligent, informed and voluntary waiver of counsel; (9) failing to proceed properly; (10) failing to grant defendant's motion to dismiss for failure to prosecute and/or prejudicial behavior and inappropriate conduct; and (11) failing to grant discovery.

This Court notes that this is not the first time we have considered a case involving this defendant and these arguments. The very similar case of *Phillips*, 149 N.C. App. 310, 560 S.E.2d 852, involved the exact same defendant as the present case. The similarities only begin there. Defendant made many of the same bizarre arguments then as he does now. That Court dealt with many of those arguments and published the opinion, making it binding authority on this panel.

As a preliminary matter, the State points out that defendant's appeal is subject to dismissal for failure to include in the record on appeal a copy of the district court judgment establishing the derivative jurisdiction of the superior court. *See State v. Felmet*, 302 N.C. 173, 273 S.E.2d 708 (1981). While the State is correct, this Court, on its own initiative pursuant to N.C.R. App. P. 9(b)(5), has ordered and added the district court judgment and notice of appeal to the record on appeal. Thus, we proceed on the merits.

I, II.

As to defendant's assignments of error 1 and 2, we cite *Phillips* as controlling law and those assignments and accompanying arguments are denied. *See Phillips*, 149 N.C. App. at 314-15, 560 S.E.2d at 855.

III.

As to defendant's third assignment of error, inasmuch as defendant relies on Article II, Section 21 of the North Carolina Constitution,

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we cite *Phillips* as controlling law and this part of his third assignment is denied. *Id.* at 315, 560 S.E.2d at 855-56.

[1] Defendant further argues, as he did in *Phillips*, that the trial court lacked *in personam* jurisdiction because there was no valid service of process and because he limited his appearances for the purposes of challenging jurisdiction. As in *Phillips*, “[d]efendant has failed to set forth any criminal case or statute providing a criminal defendant with the right to limit his appearance at trial in order to challenge jurisdiction.” *Phillips*, 149 N.C. App. at 315, 560 S.E.2d at 856. The record reveals that in the present case, defendant was lawfully served by the Yadkin County District Attorney with a “Misdemeanor Statement of Charges” for reckless driving to endanger and failure to surrender license pursuant to N.C. Gen. Stat. § 15A-922 (2001). This part of defendant’s assignment of error is also denied.

IV.

[2] Defendant’s next assignment of error contends that the trial court erred in denying him his counsel of choice. Specifically, defendant wished to have a non-lawyer advise him and the trial court refused his wish.

The Supreme Court of the United States has held:

The Sixth Amendment right to choose one’s own counsel is circumscribed in several important respects. Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court.

Wheat v. United States, 486 U.S. 153, 159, 100 L. Ed. 2d 140, 148-49, *reh’g denied*, 487 U.S. 1243, 101 L. Ed. 2d 949 (1988).

The North Carolina appellate courts have not had occasion to visit this specific area of the Sixth Amendment. Our current case law focuses mainly on the fact that an indigent defendant cannot chose his attorney if one is being appointed. *See, e.g., State v. Montgomery*, 138 N.C. App. 521, 530 S.E.2d 66 (2000). We will follow *Wheat* and hold that there is no Sixth Amendment right to be represented by a non-attorney. This assignment of error is denied.

V, VI, VII

[3] Defendant’s fifth, sixth and seventh assignments of error challenge the process by which he was arrested, served and tried. His arguments before this Court are generally the same as the arguments

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he made in the previous case. As it did there, the record before this Court reveals that defendant was properly charged with the offenses in accordance with the law.

Under N.C. Gen. Stat. § 15A-401(b)(1) (1999), an officer “may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer’s presence.” N.C. Gen. Stat. § 15A-401(b)(1); *see also* N.C. Gen. Stat. § 15A-302(b) (officer “may issue a citation to any person who he has probable cause to believe has committed a misdemeanor or infraction”).

Phillips, 149 N.C. App. at 316, 560 S.E.2d at 856.

The arresting officer, Trooper Holbrook, observed defendant make a reckless U-turn in violation of N.C. Gen. Stat. § 20-140(b) (2001), and when stopped, defendant refused to produce his driver’s license in violation of N.C. Gen. Stat. § 20-29 (2001). Both of these offenses are Class 2 misdemeanors. Trooper Holbrook issued defendant a Uniform Citation which met the necessary requirements of N.C. Gen. Stat. § 15A-302 (2001), to which defendant ultimately objected to as a method of service.

Upon making the arrest without a warrant, Officer [Holbrook] was required to take defendant before a “judicial official.” N.C. Gen. Stat. § 15A-501(2) (1999). The judicial official is required to make a determination of whether there exists probable cause to believe the crime has been committed. N.C. Gen. Stat. § 15A-511(c)(1) (1999).

Phillips, 149 N.C. App. at 316, 560 S.E.2d at 856.

Trooper Holbrook brought defendant before a magistrate who found that probable cause existed. Defendant objected to service by criminal citation and was thus served with a Misdemeanor Statement of Charges pursuant to N.C. Gen. Stat. § 15A-303(a) (2001) and N.C. Gen. Stat. § 15A-922(a), by an assistant district attorney.

After reviewing the record and defendant’s arguments, we hold these assignments of error are without merit and are overruled.

VIII.

[4] Defendant next contends that the trial court erred by imposing a jail sentence absent a voluntary waiver of counsel.

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In *Phillips*, this Court stated:

Our Supreme Court recently summarized a trial court's responsibilities pertaining to a defendant's waiver of the right to proceed without counsel. See *State v. Fulp*, 355 N.C. 171, 558 S.E.2d 156 (2002). The Court in *Fulp* noted that a defendant has the right to "... "handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes." ' ' *Id.* at 174, 558 S.E.2d at 158 (citations omitted). However, before the trial court may permit a defendant to proceed without counsel, the court must ensure that various requirements are met. *Id.* at 174-75, 558 S.E.2d at 159. First, a defendant must express his desire to proceed without counsel "... "clearly and unequivocally." ' ' *Id.* at 175. (citations omitted). Second, the trial court must determine whether a defendant " 'knowingly, intelligently, and voluntarily' waives his right to counsel." *Id.* (citation omitted). In determining if this requirement is met, it is sufficient if the trial court is satisfied as to factors set forth in N.C. Gen. Stat. § 15A-1242 (1999). *Id.*

Phillips, 149 N.C. App. at 317, 560 S.E.2d at 857. N.C. Gen. Stat. § 15A-1242 (2001) states:

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

- (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- (2) Understands and appreciates the consequences of this decision; and
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

Id.

The record is replete with discussions between defendant and two superior court judges. It seems clear to this Court that defendant unequivocally refused to have a lawyer represent him. For example, defendant stated that, "I have religious convictions, convictions against attorneys representing me." It is equally clear that defendant

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understood the applicable law, since at the time he accused Judge Wood of violating the same. The charges were read to defendant by the assistant district attorney, and he acknowledged being served with the Misdemeanor Statement of Charges that he himself requested. The trial court advised defendant of the possible sentence, and the fact that there was little likelihood that he would receive an active sentence. The only thing that defendant did not understand was that “attorney” and “assistance of counsel” are one and the same. This assignment of error is overruled.

IX.

[5] By his ninth assignment of error, defendant argues that the trial court failed to proceed properly in that he was “arraigned in neither the District or Superior Courts according to procedural due process of law in that neither court properly advised [defendant] of his right to counsel, or ask for a plea.”

As to defendant’s argument regarding the plea, he claims that because the judge had to be reminded by him that no plea was entered, that the judge required him to enter his plea after a jury had been empaneled, and that the State had already called its first witness, he has been prejudiced and deserves a new trial.

The State responds that defendant has not cited any legal authority. Further, even if the trial court should have requested the plea earlier, the trial court corrected the situation by asking him for the plea. Defendant accused the trial court of evasive behavior and then said that he had no plea at that time. At that point, the trial court properly entered a plea of not guilty on behalf of defendant. *See* N.C. Gen. Stat. § 15A-942 (2001).

Arraignment is the procedure whereby the defendant is “formally apprised of the charges pending against him and directed to plead to them.” *State v. Smith*, 300 N.C. 71, 73, 265 S.E.2d 164, 166 (1980). However, “[w]here there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of a formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding.” *Id.*

State v. Griffin, 136 N.C. App. 531, 552, 525 S.E.2d 793, 807-08, *dismissal allowed, disc. review denied*, 351 N.C. 644, 543 S.E.2d 877 (2000). It is clear from the record that defendant knew the charges against him. Further, defendant has failed to show any undue preju-

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dice from the trial court's proceedings. This assignment of error is overruled.

X, XI.

We have reviewed the remaining arguments of defendant and find them wholly without merit. Because defendant, in spite of his own efforts, received a fair trial free from prejudicial error, we find

No error.

Judges WALKER and BRYANT concur.

LARRY E. JACKSON, ADMINISTRATOR OF THE ESTATE OF JEREMY SCOTT JACKSON,
PLAINTIFF V. ASSOCIATED SCAFFOLDERS AND EQUIPMENT COMPANY, INC.
AND VAN THOMAS CONTRACTORS, INC., DEFENDANTS

ASSOCIATED SCAFFOLDERS AND EQUIPMENT COMPANY, INC., THIRD-PARTY
PLAINTIFF-APPELLANT V. COMFORT ENGINEERS, INC., THIRD-PARTY DEFENDANT-
APPELLEE

No. COA01-608

(Filed 3 September 2002)

1. Indemnity— construction contract—motion for judgment on the pleadings

The trial court did not err in a breach of contract action by granting third-party defendant's N.C.G.S. § 1A-1, Rule 12(c) motion for judgment on the pleadings regarding an indemnity provision in a construction contract, because the indemnification provisions at issue are in violation of N.C.G.S. § 22B-1 and are not severable from the remainder of the contract since the agreements at issue purport to indemnify third-party plaintiff for its own negligent actions.

2. Contracts— breach—failure to state a claim

The trial court did not err in a breach of contract action by granting third-party defendant's N.C.G.S. § 1A-1, Rule 12(c) motion for judgment on the pleadings based on third-party plaintiff's failure to state a claim, because: (1) one of the invalid indemnification provisions in the pertinent contract is not sever-

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able, rendering the entire contract invalid; and (2) there can be no breach of contract absent the existence of a valid contract.

Chief Judge EAGLES dissenting.

Appeal by third-party plaintiff from order entered 17 March 2000 by Judge James C. Spencer, Jr., in Durham County Superior Court. Heard in the Court of Appeals 15 April 2002.

Millberg & Gordon, PLLC, by William W. Stewart and John C. Millberg, for the third-party plaintiff.

Howard, Stallings, From & Hutson, PA, by B. Joan Davis, Brian E. Moore and Joseph H. Stallings, for the third-party defendant.

BRYANT, Judge.

On 27 October 1997, third-party defendant Comfort Engineers, Inc., contracted with third-party plaintiff Associated Scaffolders and Equipment Company, Inc., for Associated to erect a scaffold on the campus of the University of North Carolina at Chapel Hill. The scaffold was to be used by Comfort to install an exhaust system at the Medical Sciences Building. The agreement between Comfort and Associated for the erection of the scaffold was memorialized in a written rental agreement prepared by Associated.

While working on the installation project, Comfort employee Jeremy S. Jackson, fell from the scaffold, and died as a result of the fall. Through its insurer, Comfort paid workers' compensation benefits to Jackson's estate.

On 14 April 1999, a representative of Jackson's estate instituted a wrongful death action against Associated and Van Thomas General Contractors, Inc. On 2 July 1999, Associated filed a third-party complaint against Comfort claiming contractual indemnification and breach of contract. Comfort made a motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. This matter came on for hearing at the 13 March 2000 session of Durham County Superior Court with the Honorable James C. Spencer, Jr., presiding. By order filed 17 March 2000, Comfort's Rule 12(c) motion was granted.

On 11 December 2000, Jackson's estate settled its suit with Associated and Van Thomas; and that case was voluntarily dismissed

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with prejudice. On 10 January 2001, Associated filed notice of appeal from the order granting Comfort's Rule 12(c) motion.

Pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure, a court may dispose of claims or defenses when the lack of merit of the claim or defense is apparent upon review of the pleadings. *See* N.C. R. Civ. P. 12(c); *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 134 N.C. App. 65, 67, 516 S.E.2d 911, 913 (1999), *review allowed*, 351 N.C. 99, 540 S.E.2d 351, *aff'd in part as modified*, 351 N.C. 589, 528 S.E.2d 568 (2000). The granting of judgment on the pleadings is proper when there does not exist a genuine issue of material fact, and the only issues to be resolved are issues of law. *Brisson*, at 67, 516 S.E.2d at 913. In reviewing a motion for judgment on the pleadings, the court must consider the evidence in the light most favorable to the non-moving party, accepting as true the factual allegations as pled by the non-moving party. *Id.* at 67-68, 516 S.E.2d at 913.

I. Indemnification Clause

[1] First, Associated argues that the North Carolina Workers' Compensation Act explicitly recognizes a third-party's right to enforce an express contract of indemnity against an employer. Associated argues that an indemnity provision in a construction contract is valid and enforceable, and is not barred by N.C.G.S. § 22B-1, insofar as it does not purport to indemnify the indemnitee (Associated) for the indemnitee's own negligence. (Both parties concede that the contract at issue is a construction contract.) Associated states that the indemnification clauses on which it relies, does not purport to indemnify Associated for its own negligent acts, but only seeks indemnification for Comfort's negligent acts. In addition, Associated argues that its negligence has not been established as a matter of law, and judgment on the pleadings was inappropriate. We disagree.

N.C.G.S. § 22B-1 (2001) provides in pertinent part:

Any promise or agreement in, or in connection with, a contract or agreement relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property

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proximately caused by or resulting from the negligence, in whole or in part, of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy and is void and unenforceable. Nothing contained in this section shall prevent or prohibit a contract, promise or agreement whereby a promisor shall indemnify or hold harmless any promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the sole negligence of the promisor, its agents or employees.

Associated relies on the following provisions of its contract with Comfort, as evidence of Comfort's obligation to indemnify Associated as relates to the underlying action:

Comfort Engineers will hold harmless and defend Associated Scaffolding Co., Inc. and its agents and employees from all suits and action, including attorney's fees and all costs of litigation and judgment of any name and description arising out of or incidental to the performance of this contract or work performed thereunder.

16. SAFETY REGULATIONS: LESSEE SHALL: (1) erect, maintain and use the leased equipment in a safe and proper manner; (2) comply with all applicable laws, ordinances, rules, regulations and orders of any public authority, including, but not limited to, ALL FEDERAL OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA) and State regulations, having jurisdiction for the safety of persons or property; and (3) comply with any rules or regulations promulgated by lessor with respect to the leased equipment, its manner of erection and use.

17. Lessee agrees to indemnify and hold lessor free and harmless from any and all liability for loss, damage, or personal injury which results from non-compliance with any portion of this Paragraph, or from non-compliance with any law, regulation or other safety order.

Associated argues before this Court that in its action against Comfort, Associated only seeks indemnification for costs it may incur as a result of Comfort's negligence. Moreover, Associated concedes in its brief that N.C.G.S. § 22B-1 prevents Associated from being indemnified for its own negligence. However, the indemnification provisions at issue here violate N.C.G.S. § 22B-1 and are not severable from the remainder of the contract. Because the agreements at issue here

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undeniably purport to indemnify Associated for its *own* actions, they are void and unenforceable under this statute.

The case of *Miller Brewing Co. v. Morgan Mechanical Contractors, Inc.*, 90 N.C. App. 310, 368 S.E.2d 438 (1988), is more applicable to the instant case than the case relied on by Associated, *Bridgestone/Firestone, Inc. v. Ogden Plant Maint. Co. of N.C.*, 144 N.C. App. 503, 548 S.E.2d 807, *review on add'l issues denied*, 354 N.C. 360, 556 S.E.2d 297 (2001), *aff'd*, 355 N.C. 274, 559 S.E.2d 786 (2002) (per curiam). In *Miller*, the plaintiff filed a declaratory judgment action seeking to pursue indemnification from a contractor, Morgan Mechanical, after one of Morgan's employees was injured on the plaintiff's premises. *See Miller* at 311, 368 S.E.2d at 438. The indemnification provisions were on the back of the contract, and stated:

Seller is to save harmless and indemnify Buyer from any and all judgments, costs, expenses, including attorneys' fees, and claims on account of damaged property or personal and bodily injuries (including death) which may be sustained by Seller, Buyer, Seller's or Buyer's employe [sic], or other persons arising out of or in any way connected with the work done or goods furnished under this [agreement]

Id. at 313, 368 S.E.2d at 438. This Court held that these provisions were invalid under N.C.G.S. § 22B-1, and were not converted into an "insurance contract" by language requiring that Morgan obtain insurance to cover any such losses. *Id.* at 316-17, 368 S.E.2d at 439.

The contract language at issue here is not distinguishable in any meaningful respect from the language this Court held void in *Miller*. In addition, the related agreement under which Comfort leased equipment for the job, contained similar provisions, and included the language, "PURPOSE OF THIS CLAUSE: IT IS THE PURPOSE OF THIS CLAUSE TO SHIFT THE RISK OF ALL CLAIMS RELATED TO THE LEASED PROPERTY TO THE LESSEE [Comfort] DURING THE ENTIRE TERM OF THE LEASE."

Comfort argues that the language which violates N.C.G.S. § 22B-1 is not severable from the remainder of the contract. We agree with this argument since, as Comfort points out, we would be required to add language, rather than simply excise portions of the agreements which violate the statute. *See Carson v. National Co.*, 267 N.C. 229, 233, 147 S.E.2d 898, 901 (1966) ("Courts cannot under the guise of construction rewrite contracts executed by the litigants."). The trial

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court correctly granted the motion for judgment on the pleadings in favor of Comfort. This assignment of error is therefore overruled.

II. Breach of Contract

[2] Second, Associated argues that its pleadings adequately state a claim that Comfort breached its contract to maintain and use the scaffold in accordance with OSHA and other applicable safety regulations.

“To state a claim for breach of contract, the complaint must allege that a valid contract existed between the parties, that defendant breached the terms thereof, the facts constituting the breach, and that damages resulted from such breach.” *Claggett v. Wake Forest University*, 126 N.C. App. 602, 608, 486 S.E.2d 443, 446 (1997).

However, as previously stated, one of the invalid indemnification provisions is not severable from the contract at issue here, rendering the entire contract invalid. As there can be no breach of contract absent the existence of a valid contract, this assignment of error is overruled.

AFFIRMED.

Judge HUDSON concurs.

Chief Judge EAGLES dissents with a separate opinion.

EAGLES, Chief Judge, dissenting.

I respectfully dissent. I disagree with the majority’s conclusion that the illegal part of the contract cannot be severed from the rest of the contract. First, the illegal provision is not a central feature of the contract, so it may be severed. Second, the contract may be fully enforced without the illegal section since no other part of the contract would be affected by removal of the offending paragraph.

All parties concede that Paragraph 15 of the contract is illegal under G.S. § 22B-1, because it indemnifies Associated from its own negligence. The other two indemnification clauses referred to in the majority opinion do not violate the mandate of G.S. § 22B-1. Paragraphs 16 and 17 of the contract indemnify the lessor for liability for personal injury as a result of the lessee’s failure to comply with

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safety regulations. Since these provisions are enforceable, I vote to sever the unenforceable paragraph and leave the remainder of the contract intact.

First, the indemnity agreement in Paragraph 15 of the contract is not a central feature of the contract. The overall purpose of the contract concerns the lease of scaffolding equipment, not the division of liability. When a contract provision violates G.S. § 22B-1, but is not a central feature of that contract, the illegal provision is severable from the otherwise valid agreement. *See International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 315-16, 385 S.E.2d 553, 555 (1989). Since the indemnification clause of Paragraph 15 is not a central feature of the contract, it is severable.

"When a contract contains provisions which are severable from an illegal provision and are in no way dependent upon the enforcement of the illegal provision for their validity, such provisions may be enforced." *Rose v. Materials Co.*, 282 N.C. 643, 658, 194 S.E.2d 521, 531-32 (1973). Here, Paragraph 15 of the contract is an illegal provision. However, its enforcement is not dependent on any other provision of the contract. Paragraph 15 may be removed, leaving the rest of the contract fully enforceable, since the remainder of the contract is not dependent on the existence of Paragraph 15.

I disagree with the majority's opinion that this Court would be required to add language to the contract, instead of severing the one paragraph that violates G.S. § 22B-1. In this case Paragraph 15 is a specific and distinct part of the contract which may be severed without any great difficulty. Once the illegal portion is removed, "the contract will be given effect as if the provision so violative of public policy had not been included therein." *Gore v. Ball, Inc.*, 279 N.C. 192, 203, 182 S.E.2d 389, 395 (1971). There is no necessity to add language to the contract in order to enforce it. Instead, the lease contract would be interpreted as if Paragraph 15 never existed, with Paragraphs 16 and 17 constituting the parties' indemnity agreement.

For these reasons, I would sever Paragraph 15 from the remainder of the contract, reverse the trial court, and remand for a hearing to determine defendant-appellee's liability.

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[152 N.C. App. 694 (2002)]

STATE OF NORTH CAROLINA v. ROBERT WARREN PRATT

No. COA01-1268

(Filed 3 September 2002)

1. Criminal Law— competency to stand trial—reluctance to produce witnesses

The trial court did not abuse its discretion in a rape and kidnapping prosecution by finding defendant competent to stand trial where a psychiatrist testified that defendant's paranoid delusions prevented him from effectively assisting his defense because he believed that anyone attempting to assist him would be hindered by a curse against him. The trial court could properly conclude from evidence presented at the hearing that defendant's reluctance to provide the names of potential witnesses did not otherwise preclude assisting in his defense.

2. Evidence— lay opinion—defendant's body language—schizophrenic

The trial court did not err in a kidnapping and rape prosecution by excluding a statement from one of the victims that defendant's body language was abnormal, reminded her of a schizophrenic personality, and made her uneasy. Defense counsel later elicited the identical statement during direct examination of another witness.

3. Kidnapping— lack of consent—failure to release in safe place—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss or reduce a first-degree kidnapping charge based on insufficient evidence that the victims did not consent and on release in a safe place where defendant ordered the victims into the woods at gunpoint, bound their hands and wrapped their faces with duct tape, repeatedly threatened to kill them and left them bound and gagged in the woods at night.

Appeal by defendant from judgments entered 1 May 2001 by Judge A. Leon Stanback in Orange County Superior Court. Heard in the Court of Appeals 13 August 2002.

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[152 N.C. App. 694 (2002)]

Attorney General Roy Cooper, by Assistant Attorney General Jeffrey R. Edwards, for the State.

Leonard Law Firm, by Robert K. Leonard, for defendant appellant.

TIMMONS-GOODSON, Judge.

On 1 May 2001, a jury found Robert Warren Pratt (“defendant”) guilty of one count of first-degree rape, two counts of first-degree sexual offense, two counts of first-degree kidnapping, and one count of second-degree kidnapping. For the reasons stated herein, we find no error in the judgments of the trial court.

At trial, the State presented evidence tending to show the following: On the evening of 13 September 1995, Nyssa Matson (“Matson”) and Todd Hinson (“Hinson”) encountered defendant while walking their dogs on a trail at Duke Forest in Orange County, North Carolina. Defendant, armed with a gun and wearing dark glasses, a false beard and a wig, approached Hinson and Matson and demanded money. When they replied that they had no money, defendant ordered them into the woods, stating that, “If you resist me, I’ll kill you.”

As Hinson and Matson entered the woods, defendant approached a third individual, Charles Neuman (“Neuman”), who was also walking his dog. Defendant demanded money from Neuman, who attempted to give defendant his wallet. Defendant never took the proffered wallet, but instead ordered all three off the trail and into the forest. When they reached a level area in the woods, defendant told the victims to lie on their stomachs and place their hands behind their backs, whereupon he bound their hands and eyes with duct tape. Defendant repeatedly threatened that, “If you don’t do what I tell you, I will kill you.” Defendant then approached Matson and informed her that, “You have a choice. I can rape you or I’ll kill you. Make a decision.” After taping Matson’s mouth, defendant removed her clothing and digitally penetrated her vagina. He also penetrated her vaginally with his penis and sodomized her several times.

Upon completing his assault on Matson, defendant informed the victims that, “Well, you’ve done what you were supposed to do, so I guess I’ll let you live[,]” and departed. The victims thereafter freed themselves and summoned law enforcement. Defendant’s palm prints were later identified on the duct tape collected from the scene, and DNA testing of the semen samples taken from Matson matched DNA samples taken from defendant.

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On 26 March 2001, the court held a competency hearing to determine defendant's ability to stand trial. Dr. Robert Rollins, a forensic psychiatrist at Dortehea Dix Hospital, testified as an expert witness for the State. Dr. Rollins opined that, although defendant suffered from schizophrenia, he was nevertheless able to understand the nature and object of the proceedings against him and to assist in his own defense. Defendant presented two expert witnesses, forensic psychiatrist Dr. James Bellard, and forensic psychologist Dr. Christopher Norris. Dr. Bellard testified that, while defendant knew and understood the charges against him, his paranoid delusions prevented him from effectively assisting in a defense on his behalf. Specifically, Dr. Bellard explained that defendant believed himself to be cursed, and that anyone attempting to assist him would be hindered by this curse, and that therefore it was futile to provide names of witnesses who might testify on his behalf. Dr. Norris similarly testified that defendant suffered from paranoia and schizophrenia, but had no conclusive opinion as to whether defendant could assist in his own defense.

Upon hearing all of the evidence, the trial court found defendant competent to stand trial. On 1 May 2001, the jury found defendant guilty of all charges, whereupon the trial court sentenced him accordingly. From these judgments, defendant appeals.

Defendant presents three issues on appeal, arguing that the trial court erred in (1) finding defendant competent to stand trial; (2) excluding evidence that defendant was mentally unsound when he committed the crimes; and (3) denying defendant's motion to dismiss or, alternately, to lower the first-degree kidnapping charges to that of second-degree kidnapping. For the reasons stated herein, we find no error by the trial court.

[1] By his first assignment of error, defendant argues that the trial court erred when it found him competent to stand trial. Defendant asserts that the trial court's decision is unsupported by the evidence and the law concerning competency. We disagree.

Section 15A-1001(a) of the North Carolina General Statutes provides in pertinent part that

No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

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N.C. Gen. Stat. § 15A-1001(a) (2001). The defendant bears the burden of persuasion regarding his competency, and the trial court's findings of fact, if supported by the evidence, are conclusive on appeal. *See State v. Baker*, 312 N.C. 34, 43, 320 S.E.2d 670, 677 (1984). "The test for capacity to stand trial is whether a defendant has capacity to comprehend his position, to understand the nature of the proceedings against him, to conduct his defense in a rational manner and to cooperate with his counsel" *State v. Jackson*, 302 N.C. 101, 104, 273 S.E.2d 666, 669 (1981). Evidence that a defendant suffers from mental illness is not dispositive on the issue of competency. *See State v. Cooper*, 286 N.C. 549, 566, 213 S.E.2d 305, 317 (1975); *State v. Reid*, 38 N.C. App. 547, 549, 248 S.E.2d 390, 392 (1978), *disc. review denied*, 296 N.C. 588, 254 S.E.2d 31 (1979).

In the instant case, all three experts testified that defendant understood the nature of the proceedings against him, despite his mental illness. Dr. Rollins further opined that defendant was capable of assisting in his own defense. Dr. Bellard testified that defendant's delusions impaired his ability to assist in his defense, in that defendant was "reluctant" and "emotionally [un]able" to provide his counsel with the names of potential witnesses. Dr. Bellard conceded that defendant was otherwise capable of providing such information, however, and that defendant's reluctance to provide names would not prevent his attorney from investigating potential witnesses. Moreover, the trial judge had the opportunity to personally observe defendant and draw independent conclusions regarding his capacity to proceed, the determination of which was within the trial court's discretion. *See Jackson*, 302 N.C. at 104, 273 S.E.2d at 669 (noting that the trial court is not required to adopt the psychiatric report of either the State or the defense, but may arrive at an independent conclusion). Finally, defendant was present in court for the hearing and for trial and did not disrupt the proceedings or interfere with his attorney's statements in any manner.

Defendant argues that the case of *State v. Reid*, cited *supra*, controls the instant case. We disagree. In *Reid*, the "State relied totally on the testimony and psychiatric report" of its expert witness, who stated that "he had no current opinion as to the defendant's capacity to proceed." *Id.* at 549, 248 S.E.2d at 392. This admission by the expert witness "left the State without any evidence to contest the defendant's motion[,] or to properly support the trial court's determination that the defendant was competent to stand trial. *Id.* at 550, 248 S.E.2d at 392. Accordingly, this Court reversed the trial court.

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In contrast to *Reid*, there was sufficient evidence in the instant case to support the trial court's decision, even disregarding the testimony of the State's expert witness. Defendant's own expert witnesses both testified that defendant knew of and understood the proceeding against him. Further, Dr. Bellard opined that defendant's mental illness prevented defendant from working effectively with counsel in that defendant "would be able to name witnesses but would be reluctant to do so because of his delusion that any witness would have been affected by the curse that he believes in." Dr. Norris had no conclusive opinion on the subject. The trial court could properly conclude, based on this and other evidence presented at the hearing, that defendant's mere reluctance to provide his counsel with the names of potential witnesses did not otherwise preclude defendant from assisting in his own defense.

Our Supreme Court has noted that

a defendant does not have to be at the highest stage of mental alertness to be competent to be tried. So long as a defendant can confer with his or her attorney so that the attorney may interpose any available defenses for him or her, the defendant is able to assist his or her defense in a rational manner.

State v. Shytte, 323 N.C. 684, 689, 374 S.E.2d 573, 575 (1989). There was evidence in the case at bar from which the court could find that defendant was able to assist in his defense in a rational manner, and we perceive no abuse of discretion by the trial court in concluding that defendant was competent to stand trial. We therefore overrule this assignment of error.

[2] By his second assignment of error, defendant argues that the trial court erred by excluding from evidence a statement given by Matson to law enforcement officers. Specifically, Matson told officers that, "[w]hen [defendant] began walking toward them, she immediately thought that his body language was abnormal. It reminded her of a schizophrenic type of personality and it made her uneasy." While Matson was on the stand, the State objected to such evidence, arguing that Matson's assessment of defendant's mental condition was not within the purview of lay opinion and was thus inadmissible. After argument from both sides, the trial court sustained the State's objections. Defendant now argues that Matson's statement was relevant evidence tending to show that defendant was legally insane when he committed the acts for which he was tried, and that the exclusion of

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her statement constitutes reversible error. Defendant's argument is wholly without merit.

Although the trial court initially excluded Matson's statement from evidence, the trial transcript reveals that defense counsel later elicited the identical statement made by Matson during direct examination of another witness. Because the evidence which defendant asserts was relevant and improperly excluded was, in fact, before the jury, defendant can show no prejudice arising from this alleged error. We therefore overrule defendant's second assignment of error.

[3] In his third assignment of error, defendant argues that the trial court erred when it failed to dismiss the charge of first-degree kidnapping as to the third victim, Neuman. Defendant contends that there was no evidence that Neuman did not consent to being restrained or moved. Alternatively, defendant argues that the trial court erred by declining to reduce the charge to second-degree kidnapping, because Hinson and Neuman were released in a safe place. We disagree.

When considering a motion to dismiss, the trial court determines whether there is substantial evidence of each essential element of the offense charged and whether the defendant is the perpetrator of the offense. *See State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The trial court must consider the evidence in the light most favorable to the State, granting the State the benefit of every reasonable inference to be drawn therefrom. *See State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994). Where the State presents such substantial evidence of every element, the motion to dismiss is properly denied. *See State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

Under section 14-39 of the North Carolina General Statutes, any person who, unlawfully and without consent, confines, restrains, or removes from one place to another any other person is guilty of kidnapping if such confinement, restraint or removal is for one of several purposes outlined in the statute, including "[f]acilitating the commission of any felony" and "terrorizing the person so confined[.]" N.C. Gen. Stat. § 14-39(a)(2),(3) (2001). To prove the crime of kidnapping, the State must show an unlawful, nonconsensual restraint, confinement or removal from one place to another for the purpose of committing or facilitating the commission of one of the statutorily

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enumerated acts. *See State v. Thompson*, 306 N.C. 526, 532, 294 S.E.2d 314, 318 (1982). There are two degrees of kidnapping in North Carolina:

If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C. Gen. Stat. § 14-39(b). It should be noted that section 14-39(b) “implies a conscious, willful action on the part of the defendant to assure that his victim is released in a place of safety.” *State v. Jerrett*, 309 N.C. 239, 262, 307 S.E.2d 339, 351 (1983).

Ample evidence before the trial court indicated that Neuman and Hinson were confined and restrained against their will. Defendant ordered both men into the woods at gunpoint, where he bound their hands and wrapped their faces with duct tape. Defendant repeatedly threatened to kill the men if they did not comply with his demands. We conclude that there was sufficient evidence that Neuman and Hinson were unlawfully confined, restrained and removed from one place to another without consent. *See State v. Owen*, 24 N.C. App. 598, 603, 211 S.E.2d 830, 834 (stating that “the removal of the victim only a few feet could be sufficient to constitute kidnapping”), *cert. denied*, 287 N.C. 263, 214 S.E.2d 435 (1975).

Furthermore, there was evidence before the trial court to indicate that defendant did not leave the victims in a safe place. On the contrary, defendant left the victims bound and gagged in the woods at nighttime. We therefore hold that the trial court did not err in denying defendant’s motion to dismiss or to reduce the charge of first-degree kidnapping. Defendant’s third assignment of error is overruled.

For the reasons stated above, we hold that the trial court did not err in finding defendant competent to stand trial and in denying defendant’s motion to dismiss the charges of first-degree kidnapping.

No error.

Judges GREENE and HUNTER concur.

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STATE OF NORTH CAROLINA v. PHILLIP DAVID ALEXANDER

No. COA01-1249

(Filed 3 September 2002)

1. Evidence— pretrial statement—slight variations—admissible as corroboration

The trial court did not err in a first-degree murder prosecution by admitting a statement given by a State's witness which defendant contended did not corroborate the witness's testimony. Slight variations represented minor inconsistencies at most and the statement was admissible as corroborative evidence.

2. Firearms and Other Weapons— discharging firearm into occupied property—sufficiency of evidence

In a prosecution for discharging a firearm into occupied property, there was sufficient evidence that defendant shot the victim while standing outside the car in which the victim was sitting and the court did not err by denying a motion to dismiss.

Appeal by defendant from judgment entered 27 February 2001 by Judge William Z. Wood, Jr., in Wilkes County Superior Court. Heard in the Court of Appeals 13 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Buren R. Shields, III, for the State.

White and Crumpler, by Dudley A. Witt, for defendant appellant.

TIMMONS-GOODSON, Judge.

On 27 February 2001, a jury found Phillip David Alexander ("defendant") guilty of first-degree murder for the death of Ernest Junior Bates ("Bates") under the felony murder rule. For the reasons hereafter stated, we find no error by the trial court.

The State presented evidence at trial tending to show the following: Defendant and the victim, Bates, had an antagonistic relationship. Defendant's wife was romantically involved with Bates prior to her marriage to defendant, and her occasional encounters with Bates after her marriage caused friction between the two men.

On 24 December 1999, defendant celebrated Christmas Eve at home with his wife and several family members and friends. Jason

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Lee Handy ("Handy"), a friend of the family, was present at the celebration and testified for the State. According to Handy, defendant received several telephone calls from Bates over the course of the evening and into the following morning, during which defendant and Bates threatened and cursed one another. Before leaving for work the following morning, defendant loaded his .357 Magnum revolver and expressed his intent on taking an alternate route to work in the hopes of encountering Bates. Referring to Bates, defendant stated that, "If I see the son-of-a-bitch, I'll kill him." When defendant returned to the house approximately forty-five minutes later, he was bleeding profusely from a bullet wound in his right shoulder. Defendant explained that he had confronted Bates, and that the two men had exchanged gunfire.

The victim's nephew, Gary Medley ("Medley"), witnessed defendant's encounter with Bates and testified for the State. Medley testified that, early on the morning of 25 December 1999, he drove his uncle to a local store to purchase cigarettes. On returning from the store, they passed defendant's residence, and Bates instructed Medley to park his vehicle at a church directly across from defendant's home. Defendant emerged from his house with a rifle in his hand, and the two men shouted obscenities at one another until Bates and Medley departed. According to Medley, he and Bates were on their way to pick up Bates' vehicle later that morning when they realized that the truck in front of them belonged to defendant. Bates instructed Medley to follow defendant. Defendant subsequently pulled his vehicle to the side of the road, and Medley stopped his car beside that of defendant's. Bates and defendant then exchanged further insults through the open windows, and defendant brandished his pistol. Bates attempted to exit the vehicle, but Medley dissuaded him from doing so, and began turning the car around. At that point, defendant "[came] barreling up in his pickup, blocked [Medley's] car in . . . jumped out, and [ran] behind both vehicles." Medley testified that defendant then "jerk[ed] [Bates'] door open, and grab[bed] him, grab[bed] his coat, and he thr[ew] the gun there in his stomach . . . and fire[d] it." After defendant fired his weapon a second time, Bates pulled out his own pistol and fired it at defendant, injuring defendant's right shoulder. Defendant stepped back from the vehicle and fired his weapon a third time. The three bullets fired by defendant struck Bates in the chest and upper right arm, killing him.

Defendant testified in his own defense. According to defendant, Bates had threatened to "bury him" on several previous occasions.

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Defendant confirmed that he and Bates had spoken on the telephone the morning of 25 December 1999, and that the two men had exchanged harsh words and insults. Defendant testified that when Bates stopped at the church across from defendant's house early that morning, Bates brandished a pistol and threatened to kill defendant. Defendant explained that he took his .357 revolver with him to work because he was scared of Bates. Driving to work, defendant became more frightened when he realized that Bates was following him. Defendant testified that Medley's car then "pulled over," and, although he was "scared to death[,]," defendant decided to "try to talk to the man to see if he would go on and leave me alone." Defendant exited his vehicle, pistol in hand. As he approached Medley's vehicle, Bates shot him in the shoulder. Defendant then "just started shooting. I stepped in, started shooting, because I was scared I was going to die." Defendant admitted that he shot Bates three times, killing him, but insisted that he had no other choice.

After considering the evidence, the jury found defendant guilty of first-degree murder under the felony murder rule. The jury further found defendant guilty of three counts of discharging a weapon into occupied property, and of possession of a firearm by a felon. The trial court sentenced defendant to life imprisonment without parole, from which sentence defendant appeals.

Defendant presents two issues on appeal, arguing that the trial court erred in (1) admitting into evidence a statement given by a witness to law enforcement officers; and (2) denying defendant's motion to dismiss the felony charges of discharging a firearm into occupied property. For reasons discussed herein, we conclude that defendant's assignments of error have no merit.

[1] Defendant first argues that the trial court erred by admitting into evidence a statement given by Handy to law enforcement officers approximately two weeks before defendant's trial. Defendant contends that Handy's statement did not corroborate his testimony at trial and was therefore inadmissible as a prior consistent statement. Defendant further argues that, as the statement was made only two weeks before trial and more than a year after the events in question, the statement lacked credibility. Because Handy's statement contained prejudicial information and was inadmissible, defendant contends that he is entitled to a new trial. We disagree.

Under Rule 613 of the North Carolina Rules of Evidence, prior consistent statements by a witness are admissible to corroborate

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sworn trial testimony. *See* N.C. Gen. Stat. § 8C-1, Rule 613 (2001); *State v. Gell*, 351 N.C. 192, 204, 524 S.E.2d 332, 340, *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000). Where a witness's prior statement contains facts that manifestly contradict his trial testimony, however, such evidence may not be admitted " 'under the guise of corroborating his testimony.' " *State v. Frogge*, 345 N.C. 614, 618, 481 S.E.2d 278, 280 (1997) (quoting *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 574 (1986)).

Defendant points to four specific statements given by Handy to law enforcement officers that defendant contends do not corroborate Handy's testimony at trial. None of the four statements contains "manifestly contradictory" information, however. For example, at trial, Handy testified that defendant stated, "If I see the son-of-a-bitch, I'll kill him." In his statement to police, Handy reported that defendant said, "If I see the son-of-a-bitch I'm going, I'm going to shoot him." We conclude that the slight variation between these two statements represents a minor inconsistency at most. Clearly, there is nothing particularly contradictory about defendant's avowal to "kill" the victim rather than to "shoot" him. Further examples proffered by defendant are equally baseless. For instance, according to Handy's testimony, defendant returned to the house with the bullet wound in his shoulder "approximately thirty to forty-five minutes" after leaving. In his statement, however, Handy indicated that the time period was approximately forty-five minutes. Again, the information given in these two statements does not reflect significant discrepancies such as to render the statements inconsistent with one another. *See Gell*, 351 N.C. at 204, 524 S.E.2d at 341 (stating that, "[w]hile the earlier statements contained slight variations and some additional information, they contained nothing directly contradicting the witness' trial testimony").

As Handy's trial testimony was consistent with his prior statement, the statement was admissible as corroborative evidence. The fact that the prior statement was made two weeks before trial goes to the weight of the evidence, not to its admissibility. *See* Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 165 (5th ed. 1998) (noting that, "the more narrow the time gap between events in issue and the prior conduct or statement, the more persuasive it is"). We therefore overrule defendant's first assignment of error.

[2] By his second assignment of error, defendant contends that the trial court erred in denying his motion to dismiss the charges of discharging a firearm into occupied property, the felony upon which

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defendant's felony murder conviction was based. Defendant argues that there was insufficient evidence that he was outside of the vehicle when he fired the weapon and thus cannot properly be charged with discharging a firearm "into" occupied property. Defendant's argument is without merit.

Upon a defendant's motion to dismiss, the court must consider whether the State has presented substantial evidence of each essential element of the crime charged. *See State v. Allen*, 346 N.C. 731, 739, 488 S.E.2d 188, 192 (1997). Substantial evidence is such "relevant evidence that a reasonable mind might accept as sufficient to support a conclusion." *Id.* In examining the evidence, the court must view any contradictions or discrepancies in the light most favorable to the State, allowing all reasonable inferences to be drawn therefrom. *See State v. Gainey*, 343 N.C. 79, 85, 468 S.E.2d 227, 231 (1996). A motion to dismiss is properly denied where there is substantial evidence supporting a finding that the offense charged was committed. *See State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

Under section 14-34.1 of the North Carolina General Statutes, "[a]ny person who willfully or wantonly discharges or attempts to discharge . . . [a] firearm . . . into any . . . vehicle . . . while it is occupied is guilty of a Class E felony." N.C. Gen. Stat. § 14-34.1 (2001). In the instant case, it is undisputed that defendant intentionally fired his pistol at the victim, who was sitting in an occupied vehicle at the time. Defendant's only argument is that he did not fire his weapon "into" the vehicle, because there was some evidence at trial tending to show that defendant was inside the vehicle when he shot the victim. We disagree.

"[A] firearm can be discharged 'into' occupied property even if the firearm itself is inside the property, so long as the person discharging it is not inside the property." *State v. Mancuso*, 321 N.C. 464, 468, 364 S.E.2d 359, 362 (1988); *see also State v. Bray*, 321 N.C. 663, 670, 365 S.E.2d 571, 576 (1988) (holding that, where the defendant fired his weapon while reaching inside the vehicle, the defendant could properly be charged with discharging a firearm "into" occupied property). In the case at bar, there was substantial evidence from which a jury could find that defendant fired "into" occupied property. Medley indicated that although defendant was "almost leaning inside the car," he was definitely "standing outside" and "in the crease of the door" when he shot the victim. Moreover, when Bates fired his weapon at defendant, defendant moved "a step back" before discharging his weapon a third time. Defendant testified that he was sev-

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eral feet from the car when he “just started shooting.” Viewing the evidence in the light most favorable to the State, we conclude that there was substantial evidence that defendant was standing outside the automobile when he shot the victim, thereby discharging his weapon “into” an occupied vehicle. The trial court did not err in denying defendant’s motion to dismiss, and we therefore overrule defendant’s second assignment of error.

In conclusion, we hold that the trial court did not err in admitting a prior consistent statement by a witness; nor did it err in denying defendant’s motion to dismiss the charges of discharging a firearm into occupied property.

No error.

Judges GREENE and HUNTER concur.

FRANCES D. BARTON, PLAINTIFF-APPELLEE v. BILLY JOE SUTTON,
DEFENDANT-APPELLANT

No. COA01-1046

(Filed 3 September 2002)

1. Judgments— default—insurance company’s Rule 60 motion to set aside—notification requirements

The trial court did not err in an action arising out of a motor vehicle accident by denying unnamed defendant insurance company’s N.C.G.S. § 1A-1, Rule 60(b)(4) motion to set aside a default judgment entered against defendant individual even though defendant insurance company contends the judgment is void based on plaintiff’s failure to provide it with notice of the lawsuit as required by N.C.G.S. § 20-279.21, because there is no authority indicating that notification of the insurer would have any bearing on a trial court’s jurisdiction or authority to enter judgment, and thus, defendant failed to meet its burden to show the default judgment was void.

2. Judgments— default—insurance company’s Rule 60 motion to set aside—any reason justifying relief from operation of judgment

The trial court did not err in an action arising out of a motor vehicle accident by denying unnamed defendant insurance com-

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pany's N.C.G.S. § 1A-1, Rule 60(b)(6) motion to set aside a default judgment entered against defendant individual which would allow relief for any other reason justifying relief from the operation of the judgment, because: (1) defendant has not alleged the existence of extraordinary circumstances nor established that it has a meritorious defense; and (2) defendant has not argued that the trial court abused its discretion, nor cited any cases in which an abuse of discretion was found in similar circumstances.

Judge GREENE dissenting.

Appeal by defendant-appellant [unnamed appellant, Nationwide Mutual Insurance Company] from order entered 17 May 2001 by Judge Michael E. Beale in Cabarrus County Superior Court. Heard in the Court of Appeals 4 June 2002.

Bollinger & Piemonte, by George C. Piemonte, for plaintiff-appellee.

Robinson & Elliott, by William C. Robinson and Stephanie D. Gacek, for defendant-appellant.

Golding Holden Pope & Baker, by Chip Holmes, for unnamed defendant.

BIGGS, Judge.

Nationwide Mutual Insurance Company (defendant) appeals from the denial of its motion to set aside a default judgment entered against co-defendant Billy Joe Sutton. For the reasons that follow, we affirm the trial court.

This appeal arises from a 22 March 1997 motor vehicle accident between plaintiff and Sutton. Plaintiff filed a negligence action against Sutton, in Cabarrus County, on 15 March 2000, seeking compensation for injuries suffered in the accident. Service was effected upon Sutton on 31 March 2000, but he failed to respond. On 7 September 2000, plaintiff applied for a default judgment against Sutton. Her application was accompanied by an affidavit attesting to Sutton's failure to respond despite being properly served, and setting out the amount of her damages and attorney's fees. On 4 December 2000, the trial court entered a default judgment against Sutton in the amount of \$50,000.

On 29 March 2001, defendant filed two motions. The first sought leave to intervene in the lawsuit pursuant to N.C.G.S. § 1A-1, Rule 24,

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in order to “challenge a Default Judgment pursuant to Rule 60.” The second motion sought to have the default judgment set aside, pursuant to N.C.G.S. § 1A-1, Rule 60(b), on the basis that defendant had “received no notice, either under Rule 4 or any other actual or constructive notice, as to the institution of suit.” In an order entered 17 May 2001, defendant’s Rule 24 motion to intervene was allowed, and defendant’s Rule 60 motion to set aside the default judgment was denied. On 18 May 2001, State Farm Mutual Insurance Company filed a motion under N.C.G.S. § 1A-1, Rule 24, seeking to intervene in the action; the motion was allowed by consent order dated 25 June 2001. The present appeal involves only Nationwide, which appeals the denial of its Rule 60 motion.

I.

[1] Defendant argues first that the trial court erred in denying its motion to set aside the default judgment pursuant to N.C.G.S. § 1A-1, Rule 60(b)(4). Defendant contends that plaintiff’s failure to notify it of the pending lawsuit, as required by N.C.G.S. § 20-279.21, rendered the default judgment against Sutton void. We disagree.

Pursuant to N.C.G.S. § 1A-1, Rule 60(b)(4) (2001), “[a] defendant may be relieved from a final judgment, including a default judgment, if the judgment is void.” *Gibby v. Lindsey*, 149 N.C. App. 470, 473, 560 S.E.2d 589, 591 (2002). However, “a Rule 60(b)(4) motion is only proper where a judgment is ‘void’ as that term is defined by the law.” *Burton v. Blanton*, 107 N.C. App. 615, 616, 421 S.E.2d 381, 382 (1992). Thus, a judgment is not void “merely for an error in law, fact, or procedure[,] . . . [but] only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered.” *Id.* See also *Allred v. Tucci*, 85 N.C. App. 138, 142, 354 S.E.2d 291, 294, *disc. review denied*, 320 N.C. 166, 358 S.E.2d 47 (1987) (judgment not void unless court lacked jurisdiction over parties or subject matter, or lacked authority or power to grant relief in judgment).

In the instant case, defendant has not alleged any defect in the trial court’s jurisdiction over the parties or subject matter, and does not dispute that the court had authority to enter a default judgment. However, defendant argues that the judgment is nonetheless void, because of plaintiff’s failure to provide it with notice of the lawsuit pursuant to N.C.G.S. § 20-279.21. Under N.C.G.S. § 20-279.21(b)(3)a., an insurer is bound by a final judgment entered against an uninsured motorist only if “the insurer has been served with copy of summons,

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complaint or other process in the action against the uninsured motorist[,]" which defendant asserts was not done in this case. However, defendant cites no authority, and we do not discern any, indicating that notification of the insurer would have any bearing on a trial court's jurisdiction or authority to enter judgment. We note that in *Love v. Insurance Co. and Insurance Co. v. Moore*, 45 N.C. App. 444, 263 S.E.2d 337, *disc. review denied*, 300 N.C. 198, 269 S.E.2d 617 (1980), cited by defendant, this Court held that a default judgment was not enforceable against the insurer where the plaintiff had failed to comply with the relevant notification requirements of N.C.G.S. § 20-279.21. The Court did not, however, hold that the judgment was void on this basis. *See also Piedmont Rebar, Inc., v. Sun Constr., Inc.*, 150 N.C. App. 573, 564 S.E.2d 281 (2002) (default judgment entered against defendant not voided by failure to serve co-defendant with process). Because defendant has failed to show a connection between the alleged failure to notify it and the validity of the default judgment, we find it unnecessary to determine if defendant's contentions regarding lack of notification are correct. We conclude that defendant has failed to show that the default judgment entered against Sutton was void. Accordingly, we hold that the trial court did not err by denying defendant's motion to set it aside on that basis.

II.

[2] Defendant argues next that the trial court erred by failing to set aside the default judgment pursuant to N.C.G.S. § 1A-1, Rule 60(b)(6) (2001).

Under N.C.G.S. § 1A-1, Rule 60(b), the trial court may "relieve a party or his legal representative from a final judgment, order, or proceeding" for reasons enumerated in the statute. In addition, Rule 60(b)(6) permits the court to grant relief for any other reason "justifying relief from the operation of the judgment." This provision, which has often been described as "a grand reservoir of equitable power to do justice in a particular case," *Branch Banking & Trust Co. v. Tucker*, 131 N.C. App. 132, 137, 505 S.E.2d 179, 182 (1998), "authorizes the trial judge to exercise his discretion in granting or withholding the relief sought." (citations omitted). *Kennedy v. Starr*, 62 N.C. App. 182, 186, 302 S.E.2d 497, 499-500, *disc. review denied*, 309 N.C. 321, 307 S.E.2d 164 (1983).

On appeal, this Court's review of the trial court's Rule 60(b) ruling "is limited to determining whether the trial court abused its discretion." *Moss v. Improved B.P.O.E.*, 139 N.C. App. 172, 176, 532

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S.E.2d 825, 829 (2000) (quoting *Vaughn v. Vaughn*, 99 N.C. App. 574, 575, 393 S.E.2d 567, 568, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 238 (1990)). Abuse of discretion is shown only when the court's decision "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. McDonald*, 130 N.C. App. 263, 267, 502 S.E.2d 409, 413 (1998) (citation omitted). Moreover, "for a defendant to succeed in setting aside a default judgment under Rule 60(b)(6), he must show: (1) extraordinary circumstances exist, (2) justice demands the setting aside of the judgment, and (3) the defendant has a meritorious defense." *Gibby v. Lindsey*, 149 N.C. App. 470, 474, 560 S.E.2d 589, 592 (2002) (citing *State ex rel. Envtl. Mgmt. Comm. v. House of Raeford Farms*, 101 N.C. App. 433, 448, 400 S.E.2d 107, 117, *disc. review denied*, 328 N.C. 576, 403 S.E.2d 521 (1991)).

In the present case, defendant has not alleged the existence of "extraordinary circumstances," nor established that it has a "meritorious defense." Further, the defendant has not argued that the trial court abused its discretion, nor cited any cases in which an abuse of discretion was found in similar circumstances. We conclude that defendant failed to establish that the trial court abused its discretion in its denial of defendant's motion to set aside the default judgment against Sutton. This assignment of error is overruled.

For the reasons discussed above the judgment of the trial court is

Affirmed.

Judge GREENE dissents.

Judge HUDSON concurs.

GREENE, Judge, dissenting.

As I disagree with the majority that the trial court had the authority to render a default judgment in this case, I respectfully dissent.

According to N.C. Gen. Stat. § 20-279.21(b)(3)a., an "insurer shall be bound by a final judgment taken by the insured against an uninsured motorist if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist." N.C.G.S. § 20-279.21(b)(3)a. (2001). Furthermore, "[n]o default judgment shall be entered when the insurer has timely filed an

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answer or other pleading as required by law.” *Id.* By extension, absent notice to the insurer, the trial court may not enter a default judgment against the tortfeasor, as the protections afforded an insurer who files an answer would be meaningless without the right to notice. This is so because without notice the insurer would be unaware of the lawsuit and its opportunity to file an answer. Accordingly, without notice to defendant-insurer in this case, the trial court had “no authority to render the judgment entered,” and the default judgment is therefore void. *Burton v. Blanton*, 107 N.C. App. 615, 616, 421 S.E.2d 381, 382 (1992) (“[a] judgment is void . . . when the issuing court . . . has no authority to render the judgment entered”). As such, the trial court erred by failing to grant defendant relief from judgment pursuant to Rule 60(b)(4), *see* N.C.G.S. § 1A-1, Rule 60(b)(4) (2001) (the trial court may relieve a party from a final judgment if “[t]he judgment is void”), and the default judgment should be vacated.

CHALLENGER INDUSTRIES, INC. d/b/a DYEMASTERS, INC., PLAINTIFF v. 3-I, INC.,
DEFENDANT

No. COA01-1261

(Filed 3 September 2002)

Attachment— order dissolving—officer versus registered agent—due diligence

The trial court erred in a fraud, unjust enrichment, unfair and deceptive trade practices, and breach of contract case by filing an order on 25 July 2001 dissolving an attachment of property belonging to defendant even though plaintiff claimed it could not find defendant’s assistant secretary in North Carolina but information filed with the North Carolina Secretary of State showed a registered agent for defendant with a North Carolina address, because: (1) attachment is proper under N.C.G.S. § 1-440.3(3) when defendant is a domestic corporation whose president, vice-president, secretary or treasurer cannot be found in the State after due diligence; (2) the information available from the North Carolina Secretary of State revealed only a registered agent for defendant in North Carolina which does not fall within the purview of N.C.G.S. § 1-440.3(3); and (3) while plaintiff could have easily obtained the information regarding defendant’s registered agent for North Carolina, it could not have deduced from

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this information that the registered agent also served as defendant's assistant secretary.

Appeal by plaintiff from order filed 25 July 2001 by Judge Beverly T. Beal in Cleveland County Superior Court. Heard in the Court of Appeals 13 August 2002.

Parker, Poe, Adams and Bernstein, L.L.P., by Gaston H. Gage for plaintiff appellant.

Forman, Rossabi, Black, Marth, Iddings and Slaughter, P.A., by Amiel J. Rossabi, for defendant appellee.

GREENE, Judge.

Challenger Industries, Inc. d/b/a Dyemasters, Inc. (Plaintiff) appeals an order filed 25 July 2001 dissolving an attachment of property belonging to 3-I, Inc. (Defendant).

On 7 March 2001, Plaintiff filed a complaint alleging Defendant had engaged in fraud, unjust enrichment, unfair and deceptive practices, and breach of contract in refusing to return a good faith deposit of \$37,500.00 made by Plaintiff in accordance with a purchase agreement between the parties. Plaintiff applied for an order of attachment of Defendant's property located in Valdese, North Carolina, by filing an "affidavit in attachment proceeding" on 26 April 2001. The affidavit stated two grounds for attachment: (1) Defendant was "[a] domestic corporation whose president, vice[-]president, secretary or treasurer [could not] be found in the state after due diligence"; and (2) Defendant was "[a] person or a domestic corporation which, with intent to defraud his/her or its creditors, . . . ha[d] removed or [was] about to remove[] property from this state." On 27 April 2001, an order of attachment against the requested property was entered.

Defendant filed a motion to dissolve the attachment on 12 July 2001 stating it had a registered agent, Bruce H. Connors (Connors), in North Carolina who also served as Defendant's assistant secretary and that Plaintiff had failed to show an intent to defraud creditors. Attached to Defendant's motion to dissolve were documents filed with the North Carolina Secretary of State. These documents established that Connors was the registered agent of Defendant in North Carolina and that Defendant's president and treasurer were located in South Carolina. Defendant's "Responses to Plaintiff's First Set of

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Interrogatories” (the response), which indicated Connors’ further position as Defendant’s assistant secretary, was not filed until after Defendant’s motion to dissolve and is dated 13 July 2001. The response also listed the addresses of Defendant’s president, secretary, and other assistant secretaries, all of which were located in South Carolina.

Defendant filed its answer and counterclaim on 19 July 2001 denying the allegations in Plaintiff’s complaint and requesting a jury trial on all the issues. On 25 July 2001, the trial court granted Defendant’s request to dissolve the attachment because information filed with the North Carolina Secretary of State showed a registered agent for Defendant with a North Carolina address. Thus, Plaintiff’s allegation of due diligence was not accurate. In addition, the trial court found no showing of Defendant’s intent to defraud creditors.

The dispositive issue is whether Plaintiff could have, in the exercise of due diligence, found Defendant’s assistant secretary in North Carolina.

Pursuant to N.C. Gen. Stat. § 1-440.3(3), attachment is proper “when the defendant is . . . [a] domestic corporation, whose president, vice-president, secretary or treasurer cannot be found in the State after due diligence.” N.C.G.S. § 1-440.3(3) (2001). In this case, the information available from the North Carolina Secretary of State revealed only a *registered agent* for Defendant in North Carolina. A registered agent, however, does not fall within the purview of section 1-440.3(3). Pursuant to N.C. Gen. Stat. § 55D-30(b), “[t]he sole duty of the registered agent to the entity is to forward to the entity at its last known address any notice, process, or demand that is served on the registered agent.” N.C.G.S. § 55D-30(b) (2001). A secretary, on the other hand, is defined as an officer who “shall have the responsibility and authority to maintain and authenticate the records of the corporation.” N.C.G.S. § 55-8-40(c) (2001). Thus, while Plaintiff could have easily obtained the information regarding Defendant’s registered agent for North Carolina, it could not have deducted from this information that the registered agent also served as Defendant’s assistant secretary. As Plaintiff was not able, after due diligence, to discern Connors’ title of assistant secretary¹ by a review of the documents

1. We need not decide in this case whether Connors’ position as an assistant secretary falls within the definition of “secretary” pursuant to section 1-440.3(3). For the purposes of this opinion, we will simply assume that it does.

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[152 N.C. App. 714 (2002)]

filed with the Secretary of State² and all of the obtainable information regarding Defendant's president, treasurer, and secretary listed their location as South Carolina, the trial court erred in finding Plaintiff did not exercise due diligence under section 1-440.3(3). Accordingly, the trial court's order dissolving the attachment must be reversed.

As we have found sufficient grounds for attachment pursuant to section 1-440.3(3), we need not discuss Plaintiff's argument that the trial court also erred in finding no showing of Defendant's intent to defraud creditors, an alternative ground for attachment under 1-440.3(5). Furthermore, Plaintiff's contention that the trial court erred by entering an order without a jury trial is without merit because Defendant only asserted a request for a jury trial in its answer to Plaintiff's complaint, not in its motion to dissolve the attachment. *See* N.C.G.S. § 1-440.36(c) (2001) (if upon motion for dissolution of an attachment "a jury trial is demanded . . . the issues involved shall be submitted and determined at the same time the principal action is tried, unless the judge . . . orders an earlier trial or a separate trial").

Reversed.

Judges TIMMONS-GOODSON and HUNTER concur.

STATE OF NORTH CAROLINA v. BRIAN KEITH DICKERSON

No. COA01-1255

(Filed 3 September 2002)

1. Drugs— maintaining vehicle for drug sales—isolated incident

The trial court erred by not dismissing a charge of keeping or maintaining a motor vehicle for the sale or delivery of cocaine where defendant was in his vehicle on one occasion when cocaine was sold.

2. The response, which identified Connors as Defendant's assistant secretary, was dated 13 July 2001 and thus not available approximately two and a half months earlier when the attachment order was entered.

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2. Constitutional Law— double jeopardy—possession of cocaine—sale

Double jeopardy was not violated where defendant was sentenced for both the sale and delivery of cocaine and possession of cocaine with intent to sell or deliver.

Appeal by defendant from judgments dated 24 May 2001 by Judge Ronald L. Stephens in Alamance County Superior Court. Heard in the Court of Appeals 13 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General J. Douglas Hill, for the State.

Hemric, Lambeth, Champion & Moseley, P.A., by Ricky W. Champion, for defendant appellant.

GREENE, Judge.

Brian Keith Dickerson (Defendant) appeals judgments dated 24 May 2001 entered consistent with a jury verdict finding him guilty of possession of cocaine with intent to sell and/or deliver, sale and delivery of cocaine, and keeping and/or maintaining a motor vehicle for the sale and/or delivery of cocaine.

The evidence at trial revealed that on the night of 4 November 1999 Jennifer Wilson (Wilson), a police informant, arranged an undercover drug purchase by ordering eighty dollars worth of crack cocaine from Defendant. Defendant met Wilson and undercover police officer Deputy Jennifer Perhealth (Deputy Perhealth) in the parking lot behind Wilson's apartment. Defendant was seated on the passenger side of a vehicle when Wilson and Deputy Perhealth arrived. An unidentified person occupied the driver's seat of the vehicle.

When Wilson and Deputy Perhealth approached the passenger side of the vehicle to purchase the cocaine, Defendant told Deputy Perhealth to place the money on the dashboard in front of him. Deputy Perhealth did as requested. Defendant then handed Deputy Perhealth a clear plastic bag containing crack cocaine. Upon completion of the purchase, Wilson and Deputy Perhealth went to Wilson's apartment, and the vehicle left the parking lot. A surveillance officer was able to obtain the license plate number of the vehicle and determined it was registered to Defendant. Deputy Perhealth, who was later shown a photo lineup, identified Defendant as the man from whom she had bought the cocaine.

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At the conclusion of the State's evidence, Defendant moved to dismiss all the charges against Defendant for insufficiency of the evidence. The trial court denied this motion. Defendant did not present any evidence but renewed his earlier motion. The trial court again denied Defendant's motion.

The issues are whether: (I) the evidence was sufficient to support a charge of keeping and/or maintaining a motor vehicle for the sale and/or delivery of cocaine; and (II) the trial court erred in sentencing Defendant for both the sale and delivery of cocaine and the possession of cocaine with intent to sell and/or deliver.

I

[1] Defendant contends the isolated incident of his having been seated in a motor vehicle while selling drugs is insufficient to warrant a charge to the jury of keeping or maintaining a motor vehicle for the sale and/or delivery of cocaine. We agree.

In ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the charged offense and that the defendant is the perpetrator of the offense. *State v. Harding*, 110 N.C. App. 155, 162, 429 S.E.2d 416, 421 (1993). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990).

Pursuant to N.C. Gen. Stat. § 90-108(a)(7), it is illegal to "knowingly keep or maintain any . . . vehicle . . . which is used for the keeping or selling of [controlled substances]." N.C.G.S. § 90-108(a)(7) (2001). The statute thus prohibits the keeping or maintaining of a vehicle only when it is used for "keeping or selling" controlled substances. As stated by our Supreme Court in *State v. Mitchell*, the word "[k]eep" . . . denotes not just possession, but possession that occurs over a duration of time." *State v. Mitchell*, 336 N.C. 22, 32, 442 S.E.2d 24, 30 (1994). Thus, the fact "[t]hat an individual within a vehicle possesses marijuana on one occasion cannot establish . . . the vehicle is 'used for keeping' marijuana; nor can one marijuana cigarette found within the car establish that element." *Id.* at 33, 442 S.E.2d at 30. Likewise, the fact that a defendant was in his vehicle on one occasion when he sold a controlled substance does not by itself demonstrate the vehicle was kept or maintained to sell a controlled substance. In this case, the State presented no evidence in addition to Defendant having been seated in a vehicle when the cocaine purchase occurred.

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As such, the trial court erred by failing to dismiss the charge of keeping and/or maintaining a motor vehicle for the sale and/or delivery of cocaine.

II

[2] Defendant also argues it was error for the trial court to sentence him for both the sale and delivery of cocaine and the possession of cocaine with intent to sell and/or deliver as this violated his right against double jeopardy. We disagree.

The North Carolina General Assembly has determined that the unlawful possession of cocaine is illegal. *See* N.C.G.S. § 90-95(a)(1) (2001). The General Assembly has also established that the unlawful sale or delivery of cocaine is illegal. *See id.* “By setting out both the possession and sale as separate offenses in the statute and by prescribing the same punishment for possession and for sale, it is apparent that the General Assembly intended possession and sale to be treated as distinct crimes of equal degree, to be separately punished” *State v. Cameron*, 283 N.C. 191, 202, 195 S.E.2d 481, 488 (1973). Accordingly, we find no merit in Defendant’s argument.

Reversed and remanded for resentencing.

Judges TIMMONS-GOODSON and HUNTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Filed 3 SEPTEMBER 2002

CLEMMONS v. CLEMMONS No. 01-1396	Forsyth (00CVS9113)	Vacated and remanded
COOPER v. CREATIVE HOMES OF DISTINCTION, L.L.C. No. 01-1138	Pender (00CVS169)	Affirmed in part and reversed in part
ELLERBE-CHISOLM v. CHISOLM No. 01-1468	Mecklenburg (98CVD14066)	Affirmed
GOFORTH v. PAIN No. 01-1267	Dare (00CVD786)	Affirmed
IN RE GRAY No. 01-1216	Cabarrus (97J97)	Affirmed
IN RE HAYES No. 02-87	Cabarrus (99J85)	Affirmed
IN RE ZONING OF BATCHELOR PROP. No. 02-173	Polk (01CVS70)	Dismissed
RUSSELL v. SMITH No. 02-55	Mecklenburg (00CVS1738)	Appeal dismissed
STATE v. AARON No. 02-126	Onslow (00CRS54895)	No error
STATE v. BRINSON No. 02-50	Wayne (96CRS5405) (96CRS11737)	No error in part, vacated and remanded in part
STATE v. CARTER No. 02-46	Guilford (01CRS31377)	No error
STATE v. CHEEK No. 02-258	Guilford (99CRS23457) (99CRS23488) (99CRS32022) (99CRS37733) (99CRS37990) (99CRS40442) (99CRS92116) (99CRS92118)	No error
STATE v. CHRISCO No. 01-1319	Rockingham (00CRS11795)	No error

STATE v. DIGSBY No. 02-117	Mecklenburg (99CRS50919)	Affirmed
STATE v. GREEN No. 01-1297	Pitt (98CRS51497)	No error
STATE v. JIMERSON No. 02-111	Rutherford (01CRS691) (01CRS692)	No prejudicial error; remanded for correction of judgment
STATE v. JONES No. 02-171	Harnett (00CRS50639) (00CRS50640) (00CRS50642) (00CRS50643)	No error
STATE v. LAMBERT No. 01-919	Pasquotank (96CRS5357)	Reversed
STATE v. LENEAU No. 01-1325	Mecklenburg (00CRS14498)	No error
STATE v. OGLESBY No. 01-1550	Mecklenburg (99CRS51306)	No prejudicial error
STATE v. PHILLIPS No. 01-1214	Forsyth (00IFS15771)	Dismissed
STATE v. POWELL No. 02-202	Edgecombe (00CRS7813)	No error
STATE v. ROBINSON No. 02-209	Union (00CRS54352)	Affirmed
STATE v. TELFAIR No. 02-193	Pitt (01CRS51444) (01CRS51445) (01CRS51446)	Dismissed in part, no error in part
STATE v. WARREN No. 02-20	Carteret (01CRS50553)	No error
STATE v. WILSON No. 02-152	Guilford (00CRS104170) (00CRS104171) (00CRS104173)	No error
STATE v. WORLEY No. 02-2	Mecklenburg (00CRS2603) (00CRS2604)	No error
TEAL v. THEOFRASTOUS No. 01-956	Buncombe (99CVS1116)	Dismissed

WALL ST. LTD. P'SHIP
v. DAUGHTRIDGE
No. 01-877

Buncombe
(98CVD2799)

Affirmed

WARD v. WARD
No. 01-892

Columbus
(98CVD1275)

Reversed and
remanded

WILLIAMS v. INTERNATIONAL
PAPER CO.
No. 02-187

New Hanover
(98CVS1602)

Appeal dismissed

APPENDIXES

**ORDER ADOPTING AMENDMENTS TO THE
RULES FOR CUSTODY AND VISITATION
MEDIATION IN NORTH CAROLINA**

**ORDER ADOPTING AMENDMENTS TO
THE RULES FOR COURT-ORDERED
ARBITRATION IN NORTH CAROLINA**

**ORDER ADOPTING AMENDMENTS TO
THE RULES FOR THE DISPUTE
RESOLUTION COMMISSION**

**ORDER ADOPTING AMENDMENTS TO
THE RULES IMPLEMENTING SETTLEMENT
PROCEDURES IN EQUITABLE DISTRIBUTION
AND OTHER FAMILY FINANCIAL CASES**

**ORDER ADOPTING AMENDMENTS TO THE
RULES IMPLEMENTING STATEWIDE
MEDIATED SETTLEMENT
CONFERENCES AND OTHER
SETTLEMENT PROCEDURES
IN SUPERIOR COURT CIVIL ACTIONS**

IN THE SUPREME COURT OF NORTH CAROLINA

**Order Adopting Amendments to the Rules For Custody and
Visitation Mediation in North Carolina**

WHEREAS, section 7A-494, 50-13.1 of the North Carolina General Statutes authorized the Administrative Office of the Courts to establish a Custody and Visitation Mediation Program to provide statewide and uniform services in cases involving unresolved issues about the custody or visitation of minor children. Further, the Supreme Court of North Carolina is authorized to adopt rules governing this procedure and to supervise its implementation and operation through the Administrative Office of the Courts.

NOW, THEREFORE, the Rules for the Custody and Visitation Mediation Program are amended and adopted to read as attached hereto.

These Rules shall be promulgated by publication in the advance sheets of the Supreme Court and the Court of Appeals. They shall be effective on the 1st day of January, 2003.

Adopted by the Court in Conference this the 19th day of December, 2002.

Butterfield, J.
For the Court

Uniform Rules Regulating Mediation of Child Custody and Visitation Disputes Under the North Carolina Custody and Visitation Mediation Program.

Comment: Legislation establishing a statewide Custody and Visitation Program in North Carolina required that the Administrative Office of the Courts "promulgate rules and regulations necessary and appropriate for the administration of the program" and that services provided be "uniform." G.S. 7A-494. Uniform rules will protect families receiving such services, will allow meaningful statistical comparisons to be made, and allow both mediators and the mediation program to be periodically reevaluated. The Program is to be established in phases throughout North Carolina, beginning on July 1, 1989.

1. Goals of Mediation. The goals of custody and visitation dispute mediation are centered in the reduction of the stress and anxiety experienced by children in separation and divorce, by furnishing an alternative way for the parties to settle custody and visitation disputes. A trained mediator helps the parties reorganize the family, continue parenting their children despite separation, and begins an educational process which will allow parties to recognize and meet the needs of their children. Mediation provides a structured, confidential, nonadversarial setting which will help the parties make informed choices about matters involving their children, with the hope that such cooperative resolution will alleviate the acrimony between the parties, reducing attendant stress on both the parties and the child. A successful mediation will help the parties put a parenting plan in writing, will teach them to solve future problems without recourse to the courts, and thus reduce the stress of relitigation of custody and visitation disputes.

2. Purpose of Program. The Custody and Visitation Mediation Program is to provide the services of skilled mediators to further the goals set out above.

3. Definitions.

3.01. Mediation. A process whereby a trained, neutral third party acts to encourage and facilitate the resolution of a dispute without prescribing what the resolution should be.

3.02. Mediator. A trained, neutral third party who acts to encourage and facilitate the resolution of a dispute without prescribing what the resolution should be.

3.03. Parenting Agreement. A written agreement reached by the parties with the assistance of the mediator, which may be

presented to the court for approval and adoption as an order of the court.

4. Administration of Program. The Administrative Office of the Courts (AOC) is responsible for establishing the Program in the several judicial districts of the State, and is to promulgate rules and regulations for the administration of the program. The Director of the AOC shall appoint necessary staff to plan, organize, and administer the program on a statewide basis. The AOC is to cooperate with each Chief District Court Judge and other district personnel in implementation and administration of the program.

4.01. Employment of Mediators. Mediators are to be employed by the Chief District Court Judge of the judicial district, and are to be full or part-time employees.

4.02. In-House Contracts Permitted. When deemed appropriate by the AOC, the Chief District Court Judge may contract for delivery of mediation services, such contract to be approved by the Director. Such contracts are exempt from competitive bidding procedures under Chapter 143 of the General Statutes.

4.03. Administration of Funds. Funds appropriated by the General Assembly for the establishment and maintenance of mediation programs are to be administered by the AOC.

4.04. Multi-district Programs. The AOC may authorize all or part of a program in one district to be operated in conjunction with that of another district or districts.

4.05. Advisory Committee Established. The Director of the AOC shall appoint a Custody Mediation Advisory Committee of at least five members to advise the Custody Mediation Program. Members of the Committee are to receive the same per diem and travel expenses as members of State boards and commissions generally.

5. Local District Programs. Each local district program is to consist of a qualified mediator, or mediators, and such clerical staff as the AOC in consultation with the local program deems necessary.

6. Qualifications of Mediators. A person desiring to furnish mediation services must demonstrate that he or she:

- 1) Has at least a master's degree in psychology, social work, family counseling, or a comparable human relations discipline; and

- 2) Has completed at least 40 hours of training in mediation techniques by an instructor deemed qualified by the AOC; and
- 3) Has had professional training and experience relating to child development, family dynamics, or comparable areas; and
- 4) Meets such other criteria as specified by the AOC.

6.01. Initial Training Period. A person just beginning to furnish mediation services in the North Carolina Custody and Visitation Mediation Program shall satisfy the following requirements during an initial training period of 18-24 months following employment, unless some or all of the requirements are waived by the Director of the AOC or his designee:

Level I:

A. 18 Hours of Court Observations

(Note: Suggest that B and C occur prior to D)

B. 18 Hours of Custody Mediation Observation

C. 40 Hours of Divorce Mediation Training

D. 24 Hours of Co-Mediation

(Note: E and F begin simultaneously)

E. Minimum of 2 consecutive weeks/maximum of 4 consecutive weeks of internship in one district

F. 150 Mediation Sessions

G. Meetings/Additional Training: (As designated by the AOC)

Regional Meetings

Annual Training Meeting(s)

Trainee Progression Meetings

Level II:

A. 18 Hours of Co-Mediation (Note: To Be Completed Within 1st Quarter of Level II)

B. 150 Mediation Sessions

C. Meetings/Additional Training: (As designated by the AOC)

Regional Meetings

Annual Training Meeting(s)

Trainee Progression Meetings

Documentation is to be provided to the Chief District Court Judge and the AOC at the conclusion of each level of the Training Progression. (See Appendix B, Mediator Training Progression.)

6.02. Continuing Education. A mediator is to keep abreast of developments in the field through such professional journals and bulletins as are available; further, a mediator is to participate in at least 20 hours of continuing education each two years, in a program approved by the Director of the AOC or his designee. A mediator should also regularly participate as a co-mediator, preferably with mediators outside the mediator's judicial district.

6.03. Continuing Evaluation. The performance of a mediator should be regularly evaluated by the AOC. Results of such mediation performance evaluation will be shared with the Chief District Court Judge. Methods of evaluation may include:

- Observation through a one-way mirror;
- Videotaped sessions (with permission of the parties);
- Audio tape-recorded sessions (with permission of the parties);
- Co-mediators of the mediator and the evaluator;
- Review of written agreements for completeness and specificity.

6.04. Mediator Ethics. See Appendix B, Standards of Practice for Mediators in the North Carolina Mandatory Custody Mediation Program.

7.01. Referral to Mediation (Chapter 50 cases). All actions involving unresolved issues as to the custody or visitation of a minor child shall be ordered to mediation on such issues prior to the trial of the matter, unless the court waives mediation. Such actions include an action for custody or visitation in which no order has been previously entered, motions to modify orders previously entered, and actions to enforce custody and visitation orders. This mandatory referral procedure does not limit the right of the court to enter temporary and *ex parte* orders under the applicable statutory provisions, or to immediately enforce existing orders. The order of referral shall advise the parties that a show cause order may be issued, or other sanctions imposed, if they fail to appear at the orientation session, or the first mediation session. (See Appendix B, Brochure and form AOC-CV-632, Motion and Order to waive Custody Mediation.)

***Comment:** In the opinion of the Advisory Committee, the mandatory provisions of G.S. 50-13.1(b), the statutory authority for this section, apply only to actions brought under the*

provisions of Chapter 50 of the General Statutes. Actions instituted under the provisions of the Juvenile Code, as found in Chapter 7B of the General Statutes, often include issues of placement and visitation at the dispositional stage; such issues may, in appropriate cases, be referred for mediation by a district court judge pursuant to rule 7.02. Actions brought under the provisions of Chapter 50B of the General Statutes (Domestic Violence) are often inappropriate for mediation because they necessarily involve allegations of spousal abuse. If, however, the court finds the custody or visitation aspect of a domestic violence case to be appropriate for mediation, due consideration should be given to safety issues in the case. (See Appendix B, Domestic Violence Policy.)

7.02. Referral of Placement Issues in Juvenile cases. In a judicial district in which the custody mediation program is in operation, cases in which juvenile(s) have been adjudicated to be abused, neglected, dependent, delinquent or undisciplined, may be referred to the program for mediation of any dispute over placement of the juvenile(s), provided the Chief District Court Judge in the district has determined that such referrals are appropriate and that available resources allow mediation of such cases. The Chief District Court Judge shall regularly monitor the number of cases referred to the program to ensure that resources allow continued referral of such cases.

In Districts where the Chief Judge has authorized referrals of such cases to mediation, a referral may be made upon the motion of the Court or upon the motion of any party. In the discretion of the Presiding Judge, an order of referral to mediation may be made. The Order of referral should identify the persons who are to participate in the mediation and shall designate the persons who are entitled to receive a copy of any agreement that is reached.

If an agreement is reached in mediation regarding the placement of the juvenile(s) in question, the mediator shall assist the participants in reducing the agreement to writing and shall ensure that each participant understands the written document. The mediator shall encourage each participant to review the agreement with their attorney prior to signing the same and shall afford them a reasonable opportunity to do so. After the agreement is signed by all participants, the mediator shall promptly furnish a copy to each party, attorney, and persons designated in the referral order for review prior to the dispositional hearing. After a hearing at which all parties have

a right to be heard, the court may incorporate the terms of said agreement in its dispositional order, provided it finds the same to be in the best interests of the juvenile(s).

8. Waiver of Mediation. On its own motion, or that of either party, the court may waive the setting of a contested custody or visitation matter for mediation. Good cause includes, but is not limited to, a showing of undue hardship to a party, an agreement between the parties for private mediation, allegations of abuse or neglect of the minor child, allegations of alcoholism, drug abuse, or spouse abuse, or allegations of severe psychological, psychiatric, or emotional problems. Where a party resides more than 50 miles from court, such distance shall be considered good cause. (See Appendix B, AOC-CV-632 Motion and Order to Waive Custody Mediation.)

9. Orientation. Prior to mediation, an orientation session shall be held at which the goals and procedures of the mediation process shall be explained to the parties to reduce apprehension and avoidance of the process. An intake form shall be completed. (See Appendix B, Sample Mediation Intake Form.) The parties shall be advised that if they fail to appear for the initial mediation session, an order to show cause might be issued and the non-appearing party could be found in contempt of the court.

10. Attendance at Mediation Sessions. The mediation process shall consist of no more than three sessions, each of which shall not exceed two hours in length. A party must attend the orientation and first mediation session before deciding to withdraw from the process. The number of sessions may be extended by agreement of the parties with the permission of the Chief District Court Judge.

11. Neutral Stance of Mediator. While a mediator is to be a neutral in promoting an agreement between the parties, the mediator is to be aware of the best interests of the children involved in the case. During the mediation process, the mediator is to help the parties avoid agreements which do not promote the best interests of the child.

12. The Mediation Process. The mediator should assist the parties in focusing on the needs of their child, the need to reorganize the family and use its strengths, the need to maintain continuity of relationships and stability in the child's life, and the options available to the parties which would accomplish those goals. The mediator should help the parties select from the range of options those which are sound and workable, in an effort to reach an agreement which will reduce the conflict in the family, benefiting both the parties and child.

12.01. Authority of Mediator. The mediator shall be in control at all times of the mediation process and the procedures to be followed in the mediation. The mediator may suspend the mediation session if it becomes unsafe for any of the participants, including the mediator.

12.02. Location. The mediation proceeding shall be held in a private and safe location.

12.03. Confidentiality. The mediation proceeding shall be confidential. Neither the mediator nor any party or other person involved in mediation sessions shall be competent to testify as to communications made during or in furtherance of such mediation sessions; provided, there is no privilege as to communications made in furtherance of a crime or fraud. An individual shall not, however, obtain thereby immunity from prosecution for criminal conduct or be excused from the reporting requirement of G.S. 7A-543 or G.S. 108A-102.

12.04. Parenting Plan. A detailed and clearly written parenting agreement, or parenting plan, is the desired end-product of the mediation process. (See Appendix B, Sample Parenting Agreement). The parenting plan may include a designation of the party having legal or physical custody, and what duties and responsibilities such designation includes. The plan should also include a complete schedule of the child's time with each party, including holidays, vacation time, and special events. Arrangements may be made for special day observance, such as birthdays. The need of the child to maintain relationships with persons with whom the child has a substantial relationship may be addressed.

The mediator should help the parties reduce their agreement to writing and ensure that each party understands the written document. *Before the parties sign the proposed agreement*, the mediator shall mail a copy of the proposed agreement to parties and counsel, encourage each parties to have their attorneys review the agreement with them prior to their signing the plan, and afford them a reasonable opportunity to do so. The mediator shall promptly submit the initial signed agreement, or any signed modification agreement to the court. An Order Approving Parenting Agreement (Appendix B, AOC-CV-631) is to be attached for the judge's signature. Signed copies will be provided to both parties and their attorneys. **Some of the procedures set forth in this rule may not be applicable to mediation of placement issues in Juvenile cases. Refer to rule 7.02 for procedures in mediation of placement issues in Juvenile cases.**

12.05. Plan Incorporated in Court Order. Where an initial signed agreement or a signed modification of that agreement is submitted to the court, it shall be incorporated in a court order unless the court finds good reason not to do so. (See Appendix B, AOC-CV-631, Order Approving Parenting Agreement.) When incorporated, the agreement is enforceable as is any other court order. Even though designated “parenting agreement,” or some similar name, the incorporated agreement shall be considered a custody order or child custody determination within the meaning of Chapter 50A of the General Statutes, G.S. 14-320.1, G.S. 110-139.1, or other places where those terms appear. **Some of the procedures set forth in this rule may not be applicable to mediation of placement issues in Juvenile cases. Refer to rule 7.02 for procedures in mediation of placement issues in Juvenile cases.**

12.06. Termination of Mediation. After the parties have attended at least the orientation and first mediation session, either or both of the parties may decide not to participate further in the mediation process, and the mediator shall report to the court that no agreement was reached.

Either party may move to have the mediation proceedings dismissed and the action heard in court due to the mediator’s bias, undue familiarity with a party, or other prejudicial ground. Further, if the mediator determines that the case is not suitable for mediation due to a power imbalance between the parties, the presence of child abuse or neglect, or other reason, the mediator may report to the court that the case was not resolved. (See Appendix B, AOC-CV-914M, Order to Calendar Custody or Visitation Dispute.)

Where an agreement is not reached, the custody mediation office may make available information on community resources for families and children involved in a family reorganization.

12.07. Return to Mediation. The mediator shall explain to the parties that the needs of their children change over time, and encourage them to return to mediation if they are unable to resolve any problems caused by that factor, or other changes in circumstances. (See Appendix B, Motion and Order to Return to Custody Mediation, AOC-CV-634.)

12.08. Other Participants. With the consent of all parties, the mediator may speak with the child, in an effort to assist the parties to assess the needs and interests of the child. **Refer to rule 7.02 for special rules regarding participants in mediation of placement issues in Juvenile cases.**

12.09. Caucus with Parties. Although it is generally desirable for the mediator to talk with the parties together, if there is no objection by either party, the mediator may caucus with each party.

12.10. Evaluation of Program. The Administrative Office of the Courts shall evaluate the program from time to time, and *shall* prepare a summary of the program activities to be included in the North Carolina Courts Annual Report of the Administrative Office of the Courts.

***Comment:** In addition to evaluation of the statistics compiled and submitted by the various programs (See Appendix B, AOC-A-910M, Custody Mediation Monthly Report), user satisfaction might be monitored by the use of exit interviews, and follow-up questionnaires and telephone interviews in a sampling of cases at some time after the completion of the process.*

12.11. Complaint Procedure. The written orientation materials provided to the parties shall advise them how a complaint about the mediator, or mediation process, can be filed with the Chief District Court Judge of the judicial district. (See Appendix B, Brochure.)

IN THE SUPREME COURT OF NORTH CAROLINA

**Order Adopting Amendments to the Rules For Court-Ordered
Arbitration in North Carolina**

WHEREAS, section 7A-37.1 of the North Carolina General Statutes authorized statewide court-ordered, nonbinding arbitration in certain civil actions, and further authorized the Supreme Court of North Carolina to adopt rules governing this procedure and to supervise its implementation and operation through the Administrative Office of the Courts.

NOW, THEREFORE, the Rules for Court-Ordered Arbitration are amended and adopted to read as attached hereto.

These Rules shall be promulgated by publication in the advance sheets of the Supreme Court and the Court of Appeals. They shall be effective on the 1st day of January, 2003.

Adopted by the Court in Conference this the 19th day of December, 2002.

Butterfield, J.
For the Court

RULES FOR COURT-ORDERED ARBITRATION IN NORTH CAROLINA**RULE 1. ACTIONS SUBJECT TO ARBITRATION****(a) By Order of the Court.**

(1) District Court. All civil actions filed in the District Court Division are subject to court-ordered arbitration under these rules, except actions:

- (i) Which are assigned to a magistrate, provided that appeals from judgments of magistrates are subject to court-ordered arbitration under these rules except appeals from summary ejectment actions and actions in which the sole claim is an action on an account;
- (ii) In which class certification is sought;
- (iii) In which a request has been made for a preliminary injunction or a temporary restraining order;
- (iv) Involving family law matters including claims filed under N.C.Gen. Stat. chapters 50, 50A, 50B, 51, 52, 52B and 52C;
- (v) Involving title to real estate;
- (vi) Which are special proceedings; or
- (vii) In which the sole claim is an action on an account.

(2) Superior Court. The Senior Resident Superior Court Judge may order any civil Superior Court action to arbitration, where the amount in controversy does not exceed \$15,000, under these rules after the Court confers with the parties at a scheduling conference. The judge shall enter a written order, which finds that the action is appropriate for arbitration and that the amount in controversy does not exceed \$15,000.

(b) Arbitration by Agreement.

(1) District Court. The parties in any other civil action pending in the District Court Division may, upon joint written motion, request to submit the action to arbitration under these rules. The Court may approve the motion if it finds that arbitration under these rules is appropriate, and the amount in controversy does not

exceed \$15,000. The consent of the parties shall not be presumed, but shall be stated by the parties expressly in writing.

- (2) Superior Court.** The parties in any civil action pending in the Superior Court Division where the amount in controversy does not exceed \$15,000 may, upon joint written motion, request to submit the action to arbitration under these rules. The Court may approve the motion if it finds that arbitration under these rules is appropriate, and the amount in controversy does not exceed \$15,000. The consent of the parties shall not be presumed, but shall be stated by the parties expressly in writing.

(c) Exemption and Withdrawal From Arbitration. The Court may exempt or withdraw any action from arbitration on its own motion, or on motion of a party, made not less than 10 days before the arbitration hearing and a showing that: (i) the action is excepted from arbitration under Arb.Rule 1(a)(1) or (ii) there is a compelling reason to do so.

Administrative History

Pilot Rule Adopted: 28 August 1986.

Pilot Rule Amended: 4 March 1987.

Permanent Rule Adopted: 14 September 1989.

Amended: 8 March 1990—(a) and (d).

Amended: 1 January 2003—(a) through (d).

Comment

The purpose of these rules is to create an efficient, economical alternative to traditional litigation for prompt resolution of disputes in District Court. Subject to the opt-in of Superior Court cases under Arb.Rule 1(b), the rules provide for court-ordered arbitration of District Court actions because District Court actions are typically suitable for consideration in the manner provided in these rules and Superior Court actions are covered by another dispute resolution program. The \$15,000 jurisdictional limit by statute and Arb.Rule 1 applies only to the claim(s) actually asserted, even though the claim(s) is or are based on a statute providing for multiple damages, e.g. N.C.Gen.Stat. §§ 1-538, 75-16. An arbitrator may award damages in any amount which a party is entitled to recover. These rules do not affect the jurisdiction or functions of the magistrates where they have been assigned such jurisdiction. Counsel are expected to value their cases reasonably without Court involvement.

“Family law matters” in Arb.Rule 1(a)(1)(iv) includes all family law cases such as divorce, guardianship, adoptions, juvenile matters, child support, custody, and visitation. “Summary ejectments” and “special proceedings”, referred to in Arb.Rule 1(a)(vi), are actions so designated by the General Statutes.

RULE 2. ARBITRATORS

(a) Selection.

- (1)** The Court shall approve and maintain a list of qualified arbitrators, which shall be a public record. The parties may stipulate to an arbitrator on the Court's list within the first 20 days after the 60-day period fixed in Arb.Rule 8(b). If there is no stipulation, the Court shall appoint an arbitrator from the list and notify the parties of the arbitrator selected.
- (2)** Parties may choose an arbitrator who is not on the Court's list provided the arbitrator consents, the Court approves the choice, and the arbitrator otherwise meets all the requirements of Arb.Rule 2 with the exception of the requirement to complete the arbitrator training as prescribed by the Administrative Office of the Courts. The stipulation of agreement on an arbitrator, the arbitrator's consent, and the court order approving such stipulation shall be filed within the same 20-day period for choosing an arbitrator on the Court's list.

(b) Eligibility. An arbitrator shall be a member in good standing of the North Carolina State Bar and have been licensed to practice law for five years. The arbitrator shall have been admitted in North Carolina for at least the last two years of the five-year period. Admission outside North Carolina may be considered for the balance of the five-year period, so long as the arbitrator was admitted as a duly licensed member of the bar of a state(s) or a territory(ies) of the United States or the District of Columbia. In addition, an arbitrator shall complete the arbitrator training course prescribed by the Administrative Office of the Courts and be approved by the Chief District Court Judge for such service. Arbitrators so approved shall serve at the pleasure of the appointing Court.

(c) Fees and Expenses. Arbitrators shall be paid a \$75 fee by the Court for each arbitration hearing when they file their awards with the Court. An arbitrator may be reimbursed for expenses actually and necessarily incurred in connection with an arbitration hear-

ing and paid a reasonable fee not exceeding \$75 for work on a case not resulting in a hearing upon the arbitrator's written application to and approval by the Chief Judge of the District Court.

(d) Oath of Office. Arbitrators shall take an oath or affirmation similar to that prescribed in N.C.Gen.Stat. § 11-11, in a form approved by the Administrative Office of the Courts, before conducting any hearings.

(e) Arbitrator Ethics; Disqualification. Arbitrators shall comply with the Canons of Ethics for Arbitrators promulgated by the Supreme Court of North Carolina. Arbitrators shall be disqualified and must recuse themselves in accordance with the Canons.

(f) Replacement of Arbitrator. If an arbitrator is disqualified, recused, unable, or unwilling to serve, a replacement shall be appointed by the Court from the list of arbitrators.

Administrative History

Pilot Rule Adopted: 28 August 1986.

Pilot Rule Amended: 4 March 1987.

Permanent Rule Adopted: 14 September 1989.

Amended: 8 March 1990—(a) and (b).

Amended: 1 August 1995—(b).

Amended: 1 January 2003—(a), (b), (c), (e), and (f).

Comment

Under Arb.Rule 2(a) the parties have a right to choose one arbitrator from the list if they wish to do so, but they have *the burden of taking the initiative if they want to make the selection*, and they must do it promptly.

When assigning arbitrators to serve in cases, the Court is encouraged to regularly use all arbitrators on the Court's list as established in Arb.Rule 2(a).

The parties in a particular case may choose a person to be an arbitrator who is not on the list required by Arb.Rule 2(a)(1), provided that person consents, the choice is approved by the Chief District Court Judge, and the person otherwise meets the requirements of Arb.Rule 2. The stipulation of agreement on an arbitrator, the arbitrator's consent, and the order approving such stipulation and consent must be filed within the 20-day period mentioned in Arb.Rule 2(a)(1).

Under Arb.Rule 2(c) filing of the award is the final act at which payment should be made, closing the matter for the arbitrator. The

arbitrator should make the award when the hearing is concluded. Hearings must be brief and expedited so that an arbitrator can hear at least three per day. See Arb.Rule 3(n).

Payments and expense reimbursements authorized by Arb.Rule 2(c) are made subject to Court approval to insure conservation and judicial monitoring of the use of funds available for the program.

RULE 3. ARBITRATION HEARINGS

(a) Hearing Scheduled by the Court. Arbitration hearings shall be scheduled by the Court and held in a courtroom, if available, or in any other public room suitable for conducting judicial proceedings and shall be open to the public.

(b) Prehearing Exchange of Information. At least 10 days before the date set for the hearing, the parties shall exchange:

- (1) Lists of witnesses they expect to testify;
- (2) Copies of documents or exhibits they expect to offer in evidence; and
- (3) A brief statement of the issues and their contentions.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing. Failure to comply with Arb.Rule 3(b) may be cause for sanctions under Arb.Rule 3(l). Each party shall bring to the hearing and provide to the arbitrator a copy of these materials. These materials shall not be filed with the Court or included in the case file.

(c) Exchanged Documents Considered Authenticated. Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian, or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(d) Copies of Exhibits Admissible. Copies of exchanged documents or exhibits are admissible in arbitration hearings.

(e) Witnesses. Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(f) Subpoenas. N.C.R.Civ.P. 45 shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(g) Authority of Arbitrator to Govern Hearings. Arbitrators shall have the authority of a trial judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all contempt matters to the Court.

(h) Law of Evidence Used as Guide. The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(i) No Ex Parte Communications With Arbitrator. No ex parte communications between parties or their counsel and arbitrators are permitted.

(j) Failure to Appear; Defaults; Rehearing. If a party who has been notified of the date, time and place of the hearing fails to appear without good cause therefor, the hearing may proceed and an award may be made by the arbitrator against the absent party upon the evidence offered by the parties present, but not by default for failure to appear or by dismissing the case. If a party is in default for any other reason but no judgment has been entered upon the default pursuant to N.C.R.Civ.P. 55(b) before the hearing, the arbitrator may hear evidence and may issue an award against the party in default. The Court may order a rehearing of any case in which an award was made against a party who failed to obtain a continuance of a hearing and failed to appear for reasons beyond the party's control. Such motion for rehearing shall be filed with the Court within the time allowed for demanding trial de novo stated in Arb.Rule 5(a).

(k) No Record of Hearing Made. No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(l) Sanctions. Any party failing to attend an arbitration proceeding shall be subject to sanctions by the Court on motion of a party, report of the arbitrator, or by the Court on its own motion. These sanctions may include those provided in N.C.R.Civ.P. 11, 37(b)(2)(A)-37(b)(2)(D) and N.C.Gen.Stat. § 6-21.5.

(m) Proceedings in Forma Pauperis. The right to proceed in forma pauperis is not affected by these rules.

(n) Limits of Hearings. Arbitration hearings shall be limited to one hour unless the arbitrator determines at the hearing that more time is necessary to ensure fairness and justice to the parties.

- (1) A written application for a substantial enlargement of time for a hearing must be filed with the Court and the arbitrator, if appointed, and must be served on opposing parties at the earliest practicable time, and no later than the date for prehearing exchange of information under Arb.Rule 3(b). The Court will rule on these applications after consulting the arbitrator if appointed.
- (2) An arbitrator is not required to receive repetitive or cumulative evidence.

(o) Hearing Concluded. The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing has been concluded.

(p) Parties Must Be Present at Hearings; Representation. All parties shall be present at hearings in person or through counsel. Parties may appear pro se as permitted by law.

(q) Motions. Designation of an action for arbitration does not affect a party's right to file any motion with the Court.

- (1) The Court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions referred to the arbitrator in the exchange of information required by Arb.Rule 3(b).
- (2) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the Court so orders.

Administrative History

Pilot Rule Adopted: 28 August 1986.

Pilot Rule Amended: 4 March 1987.

Permanent Rule Adopted: 14 September 1989.

Amended: 8 March 1990—(b), (j), (o), and (q).

Amended: 1 January 2003—(a), (b), (g), (j), (l), (n), (o), (p), and (q).

Comment

Good faith compliance with Arb.Rule 3(b) is required by professional courtesy and fairness as well as the spirit of these rules.

Failure to comply with Arb.Rule 3(b) may justify a sanction of limiting of evidence otherwise admissible under Arb.Rules 3(c)-3(f) and 3(g).

Arb.Rule 3(d) contemplates that the arbitrator shall return all evidence submitted when the hearing is concluded and the award has been made. Original documents and exhibits should not be marked in any way to identify them with the arbitration, to avoid possible prejudice in any future trial.

The purpose of Arb.Rule 3(n) is to ensure that hearings are limited and expedited. Failure to limit and expedite the hearings defeats the purpose of these rules. In this connection, note the option in Arb.Rule 3(b) for use of prehearing stipulations and/or sworn or unsworn statements to meet time limits.

Under Arb.Rule 3(o) the declaration that the hearing is concluded by the arbitrator formally marks the end of the hearing. Note Arb.Rule 4(a), which requires the arbitrator to file the award within three days after the hearing is concluded or post-hearing briefs are received. The usual practice should be a statement of the award at the close of the hearing, without submission of briefs. In the unusual case where an arbitrator is willing to receive post-hearing briefs, the arbitrator should specify the points to be addressed promptly and succinctly. Time limits in these rules are governed by N.C.R. Civ. P. 6 and N.C.Gen.Stat. §§ 103-4, 103-5.

Arb.Rule 3(p) requires that all parties be present in person or through counsel. The presence of the parties or their counsel is necessary for presentation of the case to the arbitrator. Rule 3(p) does not require that a party or any representative of a party have authority to make binding decisions on the party's behalf in the matters in controversy.

The rules do not establish a separate standard for pro se representation in court-ordered arbitrations. Instead, pro se representation in court-ordered arbitrations is governed by applicable principles of North Carolina law in that area. See Arb.Rule 3(p). Conformance of practice in court-ordered arbitrations with the applicable law, whatever it may provide, is ensured by providing that pro se representation be "as permitted by law."

Under Arb.Rule 3(q)(1), the Court will rule on prehearing motions which dispose of all or part of the case on the pleadings, or which relate to procedural management of the case. The Court will normally defer to the arbitrator's consideration motions addressed to the merits of a claim requiring a hearing, the taking of evidence, or exam-

ination of records and documents other than the pleadings and motion papers, except in cases in which an N.C.R.Civ.P. 12(b) motion is filed in lieu of a responsive pleading.

RULE 4. THE AWARD

(a) Filing the Award. The award shall be in writing, signed by the arbitrator and filed with the clerk within three days after the hearing is concluded or the receipt of post-hearing briefs, whichever is later.

(b) Findings; Conclusions; Opinions. No findings of fact and conclusions of law or opinions supporting an award are required.

(c) Scope of Award. The award must resolve all issues raised by the pleadings, may be in any amount supported by the evidence, shall include interest as provided by law, and may include attorney's fees as allowed by law.

(d) Copies of Award to Parties. The arbitrator shall deliver a copy of the award to all of the parties or their counsel at the conclusion of the hearing or the Court shall serve the award after filing. A record shall be made by the arbitrator or the Court of the date and manner of service.

Administrative History

Pilot Rule Adopted: 28 August 1986.

Pilot Rule Amended: 4 March 1987.

Permanent Rule Adopted: 14 September 1989.

Amended: 1 January 2003—(a), (c), and (d).

Comment

Ordinarily, the arbitrator should issue the award at the conclusion of the hearing. See Arb.Rule 4(a). If the arbitrator wants post-hearing briefs, the arbitrator must receive them within three days, consider them, and file the award within three days thereafter. See Arb.Rule 3(o) and its Comment. If the arbitrator deems it appropriate, the arbitrator may explain orally the basis of the award.

RULE 5. TRIAL DE NOVO

(a) Trial De Novo as of Right. Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial de novo as of right upon filing a written demand for trial de novo with the Court, and service of the demand on all parties, on an approved form within 30 days after the arbitrator's award has been served, or within 10 days

after an adverse determination of an Arb.Rule 3(j) motion to rehear. Demand for jury trial pursuant to N.C.R.Civ.P. 38(b) does not preserve the right to a trial de novo. A demand by any party for a trial de novo in accordance with this section is sufficient to preserve the right of all other parties to a trial de novo. Any trial de novo pursuant to this section shall include all claims in the action.

(b) Filing Fee. The first party filing a demand for trial de novo shall pay a filing fee equivalent to the arbitrator's compensation, which shall be held by the Court until the case is terminated. The fee shall be returned to the demanding party only upon written order of the trial judge finding that the position of the demanding party has been improved over the arbitrator's award. Otherwise, the filing fee shall be deposited into the Judicial Department's General Fund.

(c) No Reference to Arbitration in Presence of Jury. A trial de novo shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the Court's approval.

(d) No Evidence of Arbitration Admissible. No evidence that there have been arbitration proceedings or of statements made and conduct occurring in arbitration proceedings may be admitted in a trial de novo, or in any subsequent proceeding involving any of the issues in or parties to the arbitration, without the consent of all parties to the arbitration and the Court's approval.

(e) Arbitrator Not to Be Called as Witness. An arbitrator may not be deposed or called as a witness to testify concerning anything said or done in an arbitration proceeding in a trial de novo or any subsequent civil or administrative proceeding involving any of the issues in or parties to the arbitration. The arbitrator's notes are privileged and not subject to discovery.

(f) Judicial Immunity. The arbitrator shall have judicial immunity to the same extent as a trial judge with respect to the arbitrator's actions in the arbitration proceeding.

Administrative History

Pilot Rule Adopted: 28 August 1986.

Pilot Rule Amended: 4 March 1987.

Permanent Rule Adopted: 14 September 1989.

Amended: 8 March 1990—(a), (b), (e), and (f).

Amended: 1 January 2003 (a), (b), (c), and (d).

RULE 6. THE COURT'S JUDGMENT

(a) Termination of Action Before Judgment. Dismissals or a consent judgment may be filed at any time before entry of judgment on an award.

(b) Judgment Entered on Award. If the case is not terminated by dismissal or consent judgment, and no party files a demand for trial de novo within 30 days after the award is served, the clerk or the Court shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be served on all parties or their counsel.

Administrative History

Pilot Rule Adopted: 28 August 1986.

Pilot Rule Amended: 4 March 1987.

Permanent Rule Adopted: 14 September 1989.

Amended: 8 March 1990—(b).

Amended: 1 January 2003—(a) and (b).

Comment

A judgment entered on the arbitrator's award is not appealable because there is no record for review by an appellate court. A trial de novo is not an "appeal," in the sense of an appeal to the North Carolina Court of Appeals from Superior Court or District Court, from the arbitrator's award. By failing to demand a trial de novo the right to appeal is waived.

RULE 7. COSTS

(a) Arbitration Costs. The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.

(b) Costs Denied if Party Does Not Improve Position in Trial De Novo. A party demanding trial de novo whose position is not improved at the trial may be denied costs in connection with the arbitration proceeding by the trial judge, even though that party prevails at trial.

Administrative History

Pilot Rule Adopted: 28 August 1986.

Pilot Rule Amended: 4 March 1987.

Permanent Rule Adopted: 14 September 1989.

Amended: 8 March 1990—(c).

Amended: 1 January 2003—(b) and (c).

RULE 8. ADMINISTRATION

(a) Actions Designated for Arbitration. The Court shall designate actions eligible for arbitration upon the filing of the complaint or docketing of an appeal from a magistrate's judgment and give notice of such designation to the parties.

(b) Hearings Rescheduled; 60 Day Limit; Continuance.

- (1) The Court shall schedule hearings with notice to the parties to begin within 60 days after: (i) the docketing of an appeal from a magistrate's judgment, (ii) the filing of the last responsive pleading, or (iii) the expiration of the time allowed for the filing of such pleading.
- (2) A hearing may be scheduled, rescheduled, or continued to a date after the time allowed by this rule only by the Court before whom the case is pending upon a written motion and a showing of a strong and compelling reason to do so.

(c) Date of Hearing Advanced by Agreement. A hearing may be held earlier than the date set by the Court, by agreement of the parties with Court approval.

(d) Forms. Forms for use in these arbitration proceedings must be approved by the Administrative Office of the Courts.

(e) Delegation of Nonjudicial Functions. To conserve judicial resources and facilitate the effectiveness of these rules, the Court may delegate nonjudicial, administrative duties and functions to supporting Court personnel and authorize them to require compliance with approved procedures.

(f) Definitions. "Court" as used in these rules means:

- (1) The Chief District Court Judge or the delegate of such judge; or
- (2) Any assigned judge exercising the Court's jurisdiction and authority in an action.

Administrative History

Pilot Rule Adopted: 28 August 1986.

Pilot Rule Amended: 4 March 1987.

Permanent Rule Adopted: 14 September 1989.

Amended: 8 March 1990—(a), (b), (d), and (f).

Amended: 1 January 2003—(a), (b), (c), (e), and (f).

Comment

One goal of these rules is to expedite disposition of claims filed in District Court. See Arb.Rule 8(a). The 60 days in Arb.Rule 8(b)(1) will allow for discovery, trial preparation, pretrial motions disposition and calendaring. A motion to continue a hearing will be heard by a judge mindful of this goal. Continuances may be granted when a party or counsel is entitled to such under law, e.g. N.C.R.Civ.P. 40(b); rule of court, e.g. N.C.Prac.R. 3; or customary practice.

Any settlement reached prior to the scheduled arbitration hearing must be reported by the parties to the Court official administering the arbitration. The parties must file dismissals or a consent judgment prior to the scheduled hearing to close the case without a hearing. If the dismissals or consent judgment are not filed before the scheduled hearing, the parties should appear at the hearing to have their agreement entered as the award of the arbitrator.

RULE 9. APPLICATION OF RULES

These Rules shall apply to cases filed on or after their effective date and to pending cases submitted by agreement of the parties under Arb.Rule 1(b) or referred to arbitration by order of the Court in those districts designated for court-ordered arbitration in accordance with G.S. §§ 7A-37 and 7A-37.1

Administrative History

Pilot Rule Adopted: 28 August 1986.

Pilot Rule Amended: 4 March 1987.

Permanent Rule Adopted: 14 September 1989.

Amended: 8 March 1990.

Amended: 1 January 2003.

Comment

A common set of rules has been adopted. These rules may be amended only by the Supreme Court of North Carolina. The enabling legislation, G.S. §§ 7A-37 and 7A-37.1, vests rule-making authority in the Supreme Court, and this includes amendments.

In the Supreme Court of North Carolina
Order Adopting Amendments to the Rules for the
Dispute Resolution Commission

WHEREAS, section 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission under the Judicial Department and charges it with the administration of mediator certification and regulation of mediator conduct and de-certification, and

WHEREAS, N.C.G.S. § 7A-38.2(b) provides for this Court to implement section 7A-38.2 by adopting rules and regulations governing the operation of the Commission,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(b), the Rules for the Dispute Resolution Commission are hereby amended to read as in following pages. These Rules shall be effective on the 19th day of December 2002.

Adopted by the Court in conference the 19th day of December, 2002. The Appellate Division Reporter shall publish the Rules for the Dispute Resolution Commission in their entirety at the earliest practicable date.

Butterfield, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT FOR THE DISPUTE RESOLUTION COMMISSION

I. OFFICERS OF THE COMMISSION.

A. **Officers.** The Commission shall establish the offices of Chair, Vice-Chair, and Secretary/Treasurer.

B. Appointment; Elections.

1. The Chair shall be appointed for a two year term and shall serve at the pleasure of the Chief Justice of the North Carolina Supreme Court.

2. The Vice-Chair and Secretary/Treasurer shall be elected by vote of the full Commission and shall serve two year terms.

C. Committees.

1. The Chair may appoint such standing and *ad hoc* committees as are needed and designate Commission members to serve as committee chairs.

2. The Chair may, ~~with approval of the full Commission,~~ appoint ex-officio members to serve on either standing or *ad hoc* committees. Ex-officio members may vote upon issues before committees but not upon issues before the Commission. Ex-officio members shall serve for a one-year term.

II. COMMISSION OFFICE; STAFF.

A. **Office.** The Chair, in consultation with the Director of the Administrative Office of the Courts, is authorized to establish and maintain an office for the conduct of Commission business.

B. **Staff.** The Chair, in consultation with the Director of the Administrative Office of the Courts, is authorized to appoint an Executive Secretary and to: (1) fix his or her terms of employment, salary, and benefits; (2) determine the scope of his or her authority and duties and (3) delegate to the Executive Secretary the authority to employ necessary secretarial and staff assistants, with the approval of the Director of the Administrative Office of the Courts.

III. COMMISSION MEMBERSHIP.

A. **Vacancies.** Upon the death, resignation or permanent incapacitation of a member of the Commission, the Chair shall notify the appointing authority and request that the vacancy created by the death, resignation or permanent incapacitation be filled. The appointment of a successor shall be for the former member's unexpired term.

B. Disqualifications. If, for any reason, a Commission member becomes disqualified to serve, that member's appointing authority shall be notified and requested to take appropriate action. If a member resigns or is removed, the appointment of a successor shall be for the former member's unexpired term.

C. Conflicts of Interest and Recusals. All members and ex-officio members of the Commission must:

1. Disclose any present or prior interest or involvement in any matter pending before the Commission or its committees for decision upon which the member or ex-officio member is entitled to vote.
2. Recuse himself or herself from voting on any such matter if his or her impartiality might reasonably be questioned; and
3. Continue to inform themselves and to make disclosures of subsequent facts and circumstances requiring recusal.

D. Compensation. Pursuant to N. C. Gen. Stat. § 138-5, ex-officio members of the Commission shall receive no compensation for their services but may be reimbursed for their out-of-pocket expenses necessarily incurred on behalf of the Commission and for their mileage, subsistence and other travel expenses at the per diem rate established by statutes and regulations applicable to state boards and commissions.

IV. MEETINGS OF THE COMMISSION.

A. Meeting Schedule. The Commission shall meet at least twice each year pursuant to a schedule set by the Commission and in special sessions at the call of the Chair or other officer acting for the Chair.

B. Quorum. A majority of Commission members shall constitute a quorum. Decisions shall be made by a majority of the members present and voting except that decisions to discipline or decertify a mediator or mediator training program shall require an affirmative vote of 8 members.

C. Public Meetings. All meetings of the Commission and minutes of such meetings shall be open and available to the public except that meetings or portions of meetings involving potentially adverse actions against mediators or mediation training programs may be treated as confidential.

D. Matters Requiring Immediate Action. If, in the opinion of the Chair, any matter requires a decision or other action before the

next regular meeting of the Commission and does not warrant the call of a special meeting, it may be referred to the Executive Committee. The Executive Committee may be considered the matter and a vote or take other action as appropriate taken by correspondence, telephone, facsimile, or other practicable method; provided, all formal action taken by the Executive Committee Commission decisions taken are is reported to the Executive Secretary Commission and included in the minutes of Commission proceedings.

V. COMMISSION'S BUDGET.

The Commission, in consultation with the Director of the Administrative Office of the Courts, shall prepare an annual budget. The budget and supporting financial information shall be public records.

VI. POWERS AND DUTIES OF THE COMMISSION.

The Commission shall have the authority to undertake activities to expand public awareness of dispute resolution procedures, to foster growth of dispute resolution services in this State and to ensure the availability of high quality mediation training programs and the competence of mediators. Specifically, the Commission is authorized and directed to do the following:

A. Review and approve or disapprove applications of (1) persons seeking to have training programs certified; (2) persons seeking certification as qualified to provide mediation training; (3) attorneys and non-attorneys seeking certification as qualified to conduct mediated settlement conferences and (4) persons or organizations seeking reinstatement following a prior suspension or decertification.

B. Review applications as against criteria for certification set forth in the *Rules Implementing Mediated Settlement Conferences (Rules)* and as against such other requirements of the North Carolina Supreme Court Dispute Resolution Commission or the Commission which amplify and clarify those *Rules*. The Commission may adopt application forms and require their completion for approval.

C. Compile and maintain lists of certified trainers and training programs along with the names of contact persons, addresses, and telephone numbers and make those lists available upon request.

D. Institute periodic review of training programs and trainer qualifications and re-certify trainers and training programs that continue to meet criteria for certification. Trainers and training programs

that are not re-certified, shall be removed from the lists of certified trainers and certified training programs.

E. Compile and keep current a list of certified mediators, which specifies the judicial districts in which each mediator wishes to practice. Periodically disseminate copies of that list to each judicial district with a mediated settlement conferences program, and make the list available upon request to any attorney, organization, or member of the public seeking it.

F. Prepare and keep current biographical information on certified mediators who wish to appear in the Mediator Information Directory contemplated in the *Rules*. Periodically disseminate updated biographical information to Senior Resident Superior Court Judges, Chief District Court Judges, Clerks of Superior Court, and Trial Court Administrators in districts in which mediators wish to serve, and

G. Make reasonable efforts on a continuing basis to ensure that the judiciary, clerks of court, court administration personnel, attorneys, and to the extent feasible, parties to mediation, are aware of the Commission and its office and the Commission's duty to receive and hear complaints against mediators and mediation trainers and training programs.

VII. MEDIATOR CONDUCT.

The conduct of all mediators, mediation trainers and managers of mediation training programs must conform to the Standards of Professional Conduct adopted by the Commission and the standards of any professional organization of which such person is a member that are not in conflict nor inconsistent with the Commission's Standards. A certified mediator shall inform the Commission of any complaint filed against or disciplinary action imposed upon the mediator by any other professional organization. Failure to do so is a violation of these Rules. Violations of the Commission's Standards or other professional standards or any conduct otherwise discovered reflecting a lack of moral character or fitness to conduct mediations or which discredits the Commission, the courts or the mediation process may subject a mediator to disciplinary proceedings by the Commission. The Commission may, through a standing committee, render advisory opinions on questions of ethics submitted by certified mediators.

VIII. COMPLAINT AND HEARING PROCEDURES

A. Initiation of Complaints.

1. By the Commission. Any member of the Commission or its Executive Secretary may bring to the attention of the full Commission any matter concerning the character, conduct or fitness to practice as a mediator or any matter concerning a certified mediation training program. The Commission may authorize the Executive Secretary to conduct an inquiry, including gathering information and interviewing persons. The Executive Secretary shall seek to resolve the matter in a manner acceptable to all parties. After reviewing the report of the Executive Secretary, the Commission may authorize a complaint against a mediator, trainer or training program. The Chair of the Commission shall appoint a panel to conduct a hearing if a complaint is filed. Such hearing shall be conducted in accordance with procedures set forth in subsection D.

2. By a Citizen. Any person, including mediation participants, attorneys for participants, and interested third parties such as insurance company representatives, may file with the Commission a complaint involving the character, conduct or the fitness to practice of a mediator. Any person, including a training program participant, may file a complaint with the Commission against a certified mediation training program or against any individual responsible for conducting, administering or promoting such a training program.

B. Form.

All complaints shall be reduced to writing on a form approved by the Commission.

C. Preliminary Inquiry; Resolution; Action.

1. The Executive Secretary of the Commission shall seek to resolve the issues raised by complaints authorized by subsection A.(2), through contacts with the complaining party, the mediator, trainer, representative of the training program or others. The Executive Secretary may consult with the chair or any member of the Commission for guidance or assistance in the informal resolution of complaints. In the event the Executive Secretary is unable to resolve a complaint in a manner acceptable to all parties, the Executive Secretary shall forward a copy of the complaint and the written results of any investigation to the Chair. ~~for further consideration.~~

~~2. The Chair or a member of the Commission appointed by the Chair shall determine whether a formal hearing is warranted or what other means or procedures should be followed to resolve the issues~~

~~raised by the complaint.~~ The Chair shall appoint a panel of three Commission members to review the written complaint, any written response of the mediator to the complaint, any written response of the complaining party rebutting the mediator's response, and the report of the Executive Secretary to determine whether the allegations merit a hearing. The members of the panel shall disclose any conflicts of interest or other information bearing on their neutrality. Any challenge to the membership of the panel shall be addressed to the Chair who shall take appropriate action. The members of the panel may interview the complainant, the mediator or any other individual who has relevant information. Within sixty days of their appointment, the panel shall file a written report with the Chair stating whether the members have determined a hearing is merited. After reviewing the panel's recommendation, the Commission shall make the final determination as to whether a hearing will be conducted. If no hearing is to be held, a copy of the panel's report shall be forwarded to the complaining party and the mediator. If a hearing is to be conducted, the panel's report will be confidential.

D. Hearings.

1. Hearing Panel. If a hearing is to be held, the Chair of the Commission shall appoint a panel of three Commissioners. ~~to conduct the hearing. Those appointed shall not have served on the review panel. The three Commissioners~~ Those appointed shall make such disclosures as required by Section III.C. The panel shall elect one of its members to serve as Chair. ~~of the panel.~~

2. Notice. The Executive Secretary shall serve a copy of the written complaint on all parties along with notice of a date, time, location of the hearing and the names of panel members appointed to conduct the hearing. The hearing shall be held within sixty (60) days after the date notice is served.

3. Challenges. Any challenge to the membership of the panel shall be addressed to the Chair who shall take appropriate action.

4. Response. Within twenty (20) days after service of the complaint and notice of hearing, the person(s) or organization(s) that are the subject(s) of the complaint (designated as "respondents"), may file a written response, by hand-delivery or registered or certified mail, with the Executive Secretary at the office established by the Commission. The Chair of the Commission ~~and~~ or the Chair of the panel may grant the respondent ten additional days to respond ~~an extension of time for response for an additional ten (10) days~~ if good cause therefor is shown in a written application filed within the twenty (20) days allowed for response. Failure to file a timely

response may be considered by the hearing panel. Within ten (10) days after the response is served on the complaining party, he or she may file a reply to the response. The Chair of the Commission or the Chair of the panel may grant the complaining party five (5) additional days to reply to the response if good cause therefor is shown in a written application filed within the ten (10) days allowed for replying to the response.

E. Hearing Procedures.

1. By appointment with the Executive Secretary, parties may examine all relevant documents and evidence in the Commission office prior to the hearing. With the approval of the Executive Secretary, copies of relevant documents and evidence may be mailed to a requesting party or parties.

2. The specific procedure to be followed in a hearing shall be determined by the panel with the primary objective being a just, fair and prompt resolution of all issues raised in a complaint. The Rules of Evidence shall be relied on as a guide to that end but need not be considered binding. The panel shall be the judge of the relevance and materiality and weight of the evidence offered.

3. Neither the complainant nor any party shall have any *ex parte* communications with the members of the panel, except with respect to scheduling matters.

4. The panel may, in special circumstances and for good cause (especially, when there is no objection), permit an attorney to represent a party by telephone or receive evidence by telephone with such limitations and conditions as it may find just and reasonable.

5. No official transcript of the proceedings need be made. The panel may permit any party to record a hearing in any manner that does not interfere with the proceeding.

6. If the complainant fails to appear at a hearing or provide evidence in support of the complaint, it may be dismissed for want of prosecution and reinstated only on a showing of good cause for the default.

7. If a person or organization, the subject of a complaint, fails to appear at a scheduled hearing or to participate in good faith or to otherwise respond, the panel may proceed to a decision on the evidence before it.

F. Panel Decision.

1. A panel may dismiss a complaint at any point in the proceedings and file a written report stating the reason for the dismissal.

2. If after a hearing, a majority of the panel finds there is substantial and competent evidence to support the imposition of sanctions against a mediator or any person or organization, the panel may recommend to the full Commission imposition of one or more appropriate sanctions, including the following:

- a. written admonishment;
- b. additional training to be completed;
- c. restriction on types of cases to be mediated in the future;
- d. suspension for a specified term;
- e. decertification; or
- f. imposition of costs of the proceeding.

3. If there is a finding that the complaint was frivolous or made with the intent to vex or harass the person or training program complained about, the Commission may assess costs of the proceeding against a complaining party.

4. The Chair of the panel shall promptly forward a written report of the panel's decision and recommendation, if any, to the Executive Secretary who shall, in turn, mail copies to the Chair and to the parties by registered or certified mail.

IX. COMMISSION DECISION.

A. Final action on any panel recommendation for discipline or adverse personnel action is reserved for Commission decision.

B. If a decision is made or an agreement reached limiting a mediator's service to specified types of cases or to suspend or decertify a mediator, trainer or training program, the Executive Secretary shall notify, appropriate judicial districts in writing of the sanction. If a training program's certification is suspended or revoked, the Executive Secretary shall remove that program from the list of certified training programs.

C. All decisions of the Commission are public records.

X. INTERNAL OPERATING PROCEDURES.

A. The Commission may adopt and publish internal operating procedures and policies for the conduct of Commission business.

B. The Commission's procedures and policies may be changed as needed on the basis of experience.

In the Supreme Court of North Carolina
Order Adopting Amendments to the Rules Implementing
Settlement Procedures in Equitable Distribution
and Other Family Financial Cases

WHEREAS, section 7A-38.4A of the North Carolina General Statutes establishes a program in district court to provide for settlement procedures to expedite settlement of equitable distribution and other family financial cases, and

WHEREAS, N.C.G.S. § 7A-38.4(a) provides for this Court to implement section 7A-38.4A by adopting rules and amendments to rules

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.4(a), Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases are hereby amended to read as in the following pages. These amended Rules shall be effective on the 21st of November, 2002.

Adopted by the Court in conference the 21st day of November, 2002. The Appellate Division Reporter shall publish the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases in their entirety, as amended through this action, at the earliest practicable date.

Butterfield, J.
For the Court

**RULES OF THE NORTH CAROLINA SUPREME COURT
IMPLEMENTING SETTLEMENT PROCEDURES IN
EQUITABLE DISTRIBUTION AND OTHER
FAMILY FINANCIAL CASES****RULE 1. INITIATING SETTLEMENT PROCEDURES****A. PURPOSE OF MANDATORY SETTLEMENT
PROCEDURES.**

Pursuant to G.S. 7A-38.4A, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules.

**B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS
AND OPPOSING COUNSEL CONCERNING SETTLE-
MENT PROCEDURES.**

In furtherance of this purpose, counsel, upon being retained to represent any party to a district court case involving family financial issues, including equitable distribution, child support, alimony, post-separation support action, or claims arising out of contracts between the parties under G.S. 50-20(d), 52-10, 52-10.1 or 52 B shall advise his or her client regarding the settlement procedures approved by these Rules and, at or prior to the scheduling conference mandated by G.S. 50-21(d), shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. ORDERING SETTLEMENT PROCEDURES.

(1) Equitable Distribution Scheduling Conference. At the scheduling conference mandated by G.S. 50-21(d) in an equitable distribution action, or at such earlier time as specified by local rule, the Court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to these rules, unless excused by the Court pursuant to Rule 1.C.(6) or by the Court or mediator pursuant to Rule 4.A.(2).

(2) Scope of Settlement Proceedings. All other financial issues existing between the parties when the equitable distribution settlement proceeding is ordered, or at any time thereafter, may be discussed, negotiated or decided at the proceeding. In those districts where a child custody and visitation mediation program has been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules only in those cases in which the parties and the mediator have agreed to include them and in which the parties have been exempted from, or have fulfilled the program requirements. In those districts where a child custody and visitation mediation program has not been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules with the agreement of all parties and the mediator.

(3) Authorizing Settlement Procedures Other Than Mediated Settlement Conference. The parties and their attorneys are in the best position to know which settlement procedure is appropriate for their case. Therefore, the Court shall order the use of a settlement procedure authorized by Rules 10-12 herein or by local rules of the District Court in the county or district where the action is pending if the parties have agreed upon the procedure to be used, the neutral to be employed and the compensation of the neutral. If the parties have not agreed on all three items, then the Court shall order the parties and their counsel to attend a mediated settlement conference conducted pursuant to these Rules.

The motion for an order to use a settlement procedure other than a mediated settlement conference shall be submitted on an AOC form at the scheduling conference and shall state:

- (a) the settlement procedure chosen by the parties;
- (b) the name, address and telephone number of the neutral selected by the parties;
- (c) the rate of compensation of the neutral;
- (d) that all parties consent to the motion.

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- (4) Content of Order.** The Court's order shall (1) require the mediated settlement conference or other settlement proceeding be held in the case; (2) establish a deadline for the completion of the conference or proceeding; and (3) state that the parties shall be required to pay the neutral's fee at the conclusion of the settlement conference or proceeding unless otherwise ordered by the Court. Where the settlement proceeding ordered is a judicial settlement conference, the parties shall not be required to pay for the neutral.

The order shall be contained in the Court's scheduling order, or, if no scheduling order is entered, shall be on an AOC form. Any scheduling order entered at the completion of a scheduling conference held pursuant to local rule may be signed by the parties or their attorneys in lieu of submitting the forms referred to hereinafter relating to the selection of a mediator.

- (5) Court-Ordered Settlement Procedures in Other Family Financial Cases.** Any party to an action involving family financial issues not previously ordered to a mediated settlement conference may move the Court to order the parties to participate in a settlement procedure. Such motion shall be made in writing, state the reasons why the order should be allowed and be served on the non-moving party. Any objection to the motion or any request for hearing shall be filed in writing with the Court within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion and notify the parties or their attorneys of the ruling. If the Court orders a settlement proceeding, then the proceeding shall be a mediated settlement conference conducted pursuant to these Rules. Other settlement procedures may be ordered if the circumstances outlined in subsection (3) above have been met.

- (6) Motion to Dispense With Settlement Procedures.** A party may move the Court to dispense with the mediated settlement conference or other settlement procedure. Such motion shall be in writing and shall state the reasons the relief is sought. For good cause shown, the Court may grant the motion. Such good cause may include, but not be limited to, the fact that the parties have participated in a settlement procedure such as non-

binding arbitration or early neutral evaluation prior to the court's order to participate in a mediated settlement conference or have elected to resolve their case through arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq.) or that one of the parties has alleged domestic violence. The Court may also dispense with the mediated settlement conference for good cause upon its own motion or by local rule.

RULE 2. SELECTION OF MEDIATOR

- A. SELECTION OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY AGREEMENT OF THE PARTIES.** The parties may select a certified family financial mediator certified pursuant to these Rules by agreement by filing with the Court a Designation of Mediator by Agreement at the scheduling conference. Such designation shall: state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules.

In the event the parties wish to select a mediator who is not certified pursuant to these Rules, the parties may nominate said person by filing a Nomination of Non-Certified Family Financial Mediator with the Court at the scheduling conference. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience, or other qualifications of the mediator; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation, if any. The Court shall approve said nomination if, in the Court's opinion, the nominee is qualified to serve as mediator and the parties and the nominee have agreed upon the rate of compensation.

Designations of mediators and nominations of mediators shall be made on an AOC form. A copy of each such form submitted to the Court and a copy of the Court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

- B. APPOINTMENT OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY THE COURT.** If the parties cannot agree upon the selection of a mediator, they shall so notify the Court

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and request that the Court appoint a mediator. The motion shall be filed at the scheduling conference and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall be on an AOC form.

Upon receipt of a motion to appoint a mediator, or in the event the parties have not filed a designation or nomination of mediator, the Court shall appoint a certified family financial mediator certified pursuant to these Rules under a procedure established by said Judge and set out in local order or rule.

The Dispute Resolution Commission shall furnish for the consideration of the District Court Judges of any district where mediated settlement conferences are authorized to be held a list of those certified family financial mediators who request appointments in said district. Said list shall contain the mediators' names, addresses and phone numbers and shall be provided in writing or on the Commission's web site.

- C. MEDIATOR INFORMATION DIRECTORY.** To assist the parties in the selection of a mediator by agreement, the Chief District Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all mediators certified pursuant to these Rules who wish to mediate in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Court in such county and the office of the Chief District Court Judge or Trial Court Administrator in such county or, in a single county district, in the office of the Chief District Court Judge or said judge's designee.
- D. DISQUALIFICATION OF MEDIATOR.** Any party may move a Court of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. WHERE CONFERENCE IS TO BE HELD. The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree to a location, the mediator shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date. The mediator is authorized to assist the parties in establishing a discovery schedule and completing discovery.

The Court's order issued pursuant to Rule 1.A.(1) shall state a deadline for completion of the conference which shall be not more than 150 days after issuance of the Court's order, unless extended by the Court. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. A party, or the mediator, may move the Court to extend the deadline for completion of the conference. Such motion shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the motion, said party shall promptly communicate its objection to the Court.

The Court may grant the request by entering a written order setting a new deadline for completion of the conference, which date may be set at any time prior to trial. Said order shall be delivered to all parties and the mediator by the person who sought the extension.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set during the conference, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery,

the filing or hearing of motions, or the trial of the case, except by order of the Court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

- (1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(b) Attorneys. At least one counsel of record for each party whose counsel has appeared in the action.

- (2) Any person required to attend a mediated settlement conference shall physically attend until such time as an agreement has been reached or the mediator, after conferring with the parties and their counsel, if any, declares an impasse. No mediator shall prolong a conference unduly.

Any such person may have the attendance requirement excused or modified, including allowing a person to participate by phone, by agreement of both parties and the mediator or by order of the Court. Ordinarily, attorneys for the parties may be excused from attending only after they have appeared at the first session.

- B. FINALIZING BY NOTARIZED AGREEMENT, CONSENT ORDER AND/OR DISMISSAL.** The essential terms of the parties' agreement shall be reduced to writing as a summary memorandum at the conclusion of the conference unless the parties have reduced their agreement to writing, have signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to the its terms.

Within thirty (30) days of reaching agreement at the conference, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate. In the event the parties fail to agree on the wording or terms of a final agreement or court order, the mediator may schedule

another session if the mediator determines that it would assist the parties.

- C. PAYMENT OF MEDIATOR'S FEE.** The parties shall pay the mediator's fee as provided by Rule 7.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES

If any person required to attend a mediated settlement conference fails to attend without good cause, the Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action seeking sanctions, or the Court on its own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law. (See also Rule 7.F. and the Comment to Rule 7.F.)

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

- (1) **Control of Conference.** The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court ~~upon the recommendation of the Dispute Resolution Commission~~, which shall contain a provision prohibiting mediators from prolonging a conference unduly.
- (2) **Private Consultation.** The mediator may communicate privately with any participant during the conference. However, there shall be no *ex parte* communication before or outside the conference between the mediator and any counsel or party on any matter touching the proceeding, except with regard to scheduling matters. Nothing in this rule prevents the mediator from engaging in *ex parte* communications, with the consent of the parties, for the purpose of assisting settlement negotiations.

B. DUTIES OF MEDIATOR.

- (1) The mediator shall define and describe the following at the beginning of the conference:
 - (a) The process of mediation;
 - (b) The differences between mediation and other forms of conflict resolution;
 - (c) The costs of the mediated settlement conference;
 - (d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;
 - (e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;
 - (f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;
 - (g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.4A(j);
 - (h) The duties and responsibilities of the mediator and the participants; and
 - (i) The fact that any agreement reached will be reached by mutual consent.
- (2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.
- (3) **Declaring Impasse.** It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.
- (4) **Reporting Results of Conference.** The mediator shall report to the Court, or its designee, using an AOC form, within 10 days of the completion of the conference, whether or not an agreement was reached by the parties. If the case is settled or otherwise disposed of prior to the conference, the mediator shall file the report indi-

cating the disposition of the case, the person who informed the mediator that settlement had been reached, and the person who will present final documents to the court.

If an agreement was reached at the conference, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file such consent judgment or dismissals. If partial agreements are reached at the conference, the report shall state what issues remain for trial. The mediator's report shall inform the Court of the absence without permission of any party or attorney from the mediated settlement conference. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the mediator to provide statistical data in the report for evaluation of the mediated settlement conference program.

Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the court and sanctions.

- (5) Scheduling and Holding the Conference.** The mediator shall schedule the conference and conduct it prior to the conference completion deadline set out in the Court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless changed by written order of the Court.
- (6) Informational Brochure.** Before the conference, the mediator shall distribute to the parties or their attorneys a brochure prepared by the Dispute Resolution Commission explaining the mediated settlement conference process and the operations of the Commission.
- (7) Evaluation Forms.** ~~The mediator shall distribute to the parties and their attorneys at the conference an evaluation form prepared by the Dispute Resolution Commission. All participants are encouraged to fill out and return the forms to the mediator to further the mediator's professional development. At the mediated settle-~~

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ment conference, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per party with additional copies distributed upon request. The evaluation is intended for purpose of self-improvement and the mediator shall review returned evaluation forms.

RULE 7. COMPENSATION OF THE MEDIATOR AND SANCTIONS

- A. BY AGREEMENT.** When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator.
- B. BY COURT ORDER.** When the mediator is appointed by the Court, the parties shall compensate the mediator for mediation services at the rate of \$125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of \$125, which accrues upon appointment and shall be paid if the case settles prior to the mediated settlement conference or if the court approves the substitution of a mediator selected by the parties for a court appointed mediator.
- C. PAYMENT OF COMPENSATION BY PARTIES.** Unless otherwise agreed to by the parties or ordered by the Court, the mediator's fee shall be paid in equal shares by the parties. Payment shall be due and payable upon completion of the conference.
- D. INABILITY TO PAY.** No party found by the Court to be unable to pay a full share of a mediator's fee shall be required to pay a full share. Any party required to pay a share of a mediator fee pursuant to Rule 7.B. and C. may move the Court to pay according to the Court's determination of that party's ability to pay.

In ruling on such motions, the Judge may consider the income and assets of the movant and the outcome of the action. The Court shall enter an order granting or denying the party's motion. In so ordering, the Court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a settlement conference pursuant to these rules shall accept as payment in full of a party's share of the mediator's fee that portion paid by or on behalf of the party pursuant to an order of the Court issued pursuant to this rule.

- E. POSTPONEMENT FEES.** As used herein, the term “postponement” shall mean rescheduling or not proceeding with a settlement conference once a date for the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not postpone the conference without good cause. A conference may be postponed only after notice to all parties of the reason for the postponement, payment to the mediator of a postponement fee as provided below or as agreed when the mediator is selected, and consent of the mediator and the opposing attorney.

In cases in which the court appoints the mediator, if a settlement conference is postponed without good cause within seven (7) business days of the scheduled date, the fee shall be \$125. If the settlement conference is postponed without good cause within three (3) business days of the scheduled date, the fee shall be \$250. Postponement fees shall be paid by the party requesting the postponement unless agreed to by the parties. Postponement fees are in addition to the one-time, per case administrative fee provided for in Rule 7.B.

- F. SANCTIONS FOR FAILURE TO PAY MEDIATOR’S FEE.** Willful failure of a party to make timely payment of that party’s share of the mediator’s fee (whether the one time, per case administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status or the inability to pay his or her full share of the fee to promptly move the Court for a determination of indigency or the inability to pay a full share, shall subject that party to the contempt power of the court constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by the court.

DRC COMMENTS TO RULE 7

DRC Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

DRC Comment to Rule 7.C.

If a party is found by the Court to have failed to attend a family financial settlement conference without good cause, then the

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Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 7.E.

Though FFS Rule 7.E. provides that mediators "shall" assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, unexpected and unavoidable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rule 7.F.

If the Family Financial Settlement Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. FFS Rule 7.F. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.E. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as family financial mediators. For certification, a person must have complied with the requirements in each of the following sections.

A. Training and Experience.

1. Be an Advanced Practitioner member of the Association for Conflict Resolution who is subject to requirements equiva-

lent to those in effect for Practitioner Members of the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution; or

~~2. Have completed a 40 hour family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9 and have additional experience as an attorney and/or judge of the General Court of Justice for at least four years who is either:~~

2. Be an attorney and/or judge for at least five years who is either:

(a) a member in good standing of the North Carolina State Bar, pursuant to Title 27, N.C. Administrative Code. The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000; or

(b) a member similarly in good standing of the Bar of another state; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney;

~~Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule.~~

and who has completed either:

(c) a 40 hour family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9; or

(d) a 16 hour supplemental family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9, after having been certified as a Superior Court mediator by that Commission.

B. If not licensed to practice law in one of the United States, have completed a six hour training on North Carolina legal

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terminology, court structure and civil procedure provided by a trainer certified by the Dispute Resolution Commission; and have observed with the permission of the parties as a neutral observer two mediated settlement conferences ordered by a Superior Court, the North Carolina Office of Administrative Hearings, Industrial Commission or the US District Courts for North Carolina, and conducted by a certified Superior Court mediator.

- C. Be a member in good standing of the State Bar of one of the United States as required by Rule 8.A. or have provided to the Dispute Resolution Commission three letters of reference as to the applicant's good character and experience. as required by Rule 8.A.

- ~~D. Have observed with the permission of the parties five mediated settlement conferences as a neutral observer:~~

~~(1) three of which shall be settlement conferences involving custody or family financial issues conducted by a mediator who is certified pursuant to these rules, who is an Advanced Practitioner Member of the Association for Conflict Resolution and subject to requirements equivalent to those in effect for Practitioner Members of the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution, or who is an A.O.C. mediator.~~

~~(2) two of which may be mediated settlement conferences ordered by a Superior Court, the North Carolina Office of Administrative Hearings, Industrial Commission or the US District Courts for North Carolina, and conducted by a certified Superior Court mediator.~~

- D. Have observed with the permission of the parties two mediated settlement conferences as a neutral observer which involve custody or family financial issues and which are conducted by a mediator who is certified pursuant to these rules, who is an Advanced Practitioner Member of the Association for Conflict Resolution and subject to requirements equivalent to those in effect for Practitioner Members of the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution, or who is an A.O.C. mediator.

- E. Demonstrate familiarity with the statutes, rules, and standards of practice and conduct governing mediated settlement conferences conducted pursuant to these Rules.
- F. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. Applicants for certification and recertification and all certified family financial mediators shall report to the Commission any criminal convictions, disbarments or other disciplinary complaints and actions as soon as the applicant or mediator has notice of them. Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule.
- G. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission.
- H. Pay all administrative fees established by the Administrative Office of the Court in consultation with the Dispute Resolution Commission.
- I. Agree to accept as payment in full of a party's share of the mediator's fee as ordered by the Court pursuant to Rule 7.
- ~~J. Agree to be placed on at least one district's mediator appointment list and accept appointments unless the mediator has a conflict of interest which would justify disqualification as mediator.~~
- J.K.** Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include advanced divorce mediation training, attendance at conferences or seminars relating to mediation skills or process, and consultation with other family and divorce mediators about cases actually mediated. Mediators seeking recertification beyond one year from the date of initial certification may also be required to demonstrate that they have completed 8 hours of family law training, including tax issues relevant to divorce and property distribution, and 8 hours of training in family dynamics, child development and interpersonal relations at any time prior to that recertification.) Mediators shall report on a Commission approved form.

Certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Dispute Resolution

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Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

Certification of mediators who have been certified as family financial mediators by the Dispute Resolution Commission prior to the adoption of these Rules may not be revoked or not renewed solely because they do not meet the experience and training requirements in Rule 8.

~~The Dispute Resolution Commission may certify applicants who satisfy the requirements of Rule 8.B. and 8.D. within six (6) months of the adoption of these Rules if they have satisfied, on the date of the adoption of these Rules, all other requirements of Rule 8 as it existed immediately prior to the adoption of these Rules.~~

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

- A. Certified training programs for mediators certified pursuant to ~~these rules~~ Rule 8.A.2.(c) shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the subjects in each of the following sections:
- (1) Conflict resolution and mediation theory.
 - (2) Mediation process and techniques, including the process and techniques typical of family and divorce mediation.
 - (3) ~~Knowledge of e~~Communication and information gathering skills.
 - (4) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct adopted by the Supreme Court.
 - (5) Statutes, rules, and practice governing mediated settlement conferences conducted pursuant to these Rules.
 - (6) Demonstrations of mediated settlement conferences with and without attorneys involved.
 - (7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and dis-

putants, which simulations shall be supervised, observed and evaluated by program faculty.

- (8) An overview of North Carolina law as it applies to custody and visitation of children, equitable distribution, alimony, child support, and post separation support.
- (9) An overview of family dynamics, the effect of divorce on children and adults, and child development.
- (10) Protocols for the screening of cases for issues of domestic violence and substance abuse.
- (11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences family financial settlement procedures in North Carolina.

B. Certified training programs for mediators certified pursuant to Rule 8.A.2.(d) shall consist of a minimum of sixteen hours of instruction. The curriculum of such programs shall include the subjects listed in Rule 9.A. There shall be at least two simulations as specified in subsection (7).

B.C. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states or approved by the Association for Conflict Resolution (ACR) with requirements equivalent to those in effect for the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule. The Dispute Resolution Commission may require attendees of an ACR approved program to demonstrate compliance with the requirements of Rule 9.A.(5) and 9.A.(8). either in the ACR approved training or in some other acceptable course.

C.D. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES**A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES.**

Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Court may order the use of those procedures listed in Rule 10.B. unless the Court finds: that the parties did not agree upon the procedure to be utilized, the neutral to conduct it, or the neutral's compensation; or that the procedure selected is not appropriate for the case or the parties. Judicial settlement conferences may be ordered only if permitted by local rule.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES.

In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

- (1) **Neutral Evaluation** (Rule 11), in which a neutral offers an advisory evaluation of the case following summary presentations by each party.
- (2) **Judicial Settlement Conference** (Rule 12), in which a District Court Judge assists the parties in reaching their own settlement, if allowed by local rules.
- (3) **Other Settlement Procedures** described and authorized by local rule pursuant to Rule 13.

The parties may agree to use arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq.) which shall constitute good cause for the court to dispense with settlement procedures authorized by these rules (Rule 1.C.6).

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

- (1) **When Proceeding is Conducted.** The neutral shall schedule the conference and conduct it no later than 150 days from the issuance of the Court's order or no later than the deadline for completion set out in the Court's order, unless extended by the Court. The neutral shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the neutral shall select a date and time for the conference. Deadlines for completion of the confer-

ence shall be strictly observed by the neutral unless changed by written order of the Court.

- (2) **Extensions of Time.** A party or a neutral may request the Court to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. The Court may grant the extension and enter an order setting a new deadline for completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.
- (3) **Where Procedure is Conducted.** Settlement proceedings shall be held in any location agreeable to the parties. If the parties cannot agree to a location, the neutral shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.
- (4) **No Delay of Other Proceedings.** Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.
- (5) **Inadmissibility of Settlement Proceedings.** Evidence of statements made and conduct occurring in a settlement proceeding conducted under this section shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim, except in proceedings for sanctions or proceedings to enforce a settlement of the action. No settlement agreement reached at a settlement proceeding conducted pursuant to these Rules shall be enforceable unless it has been reduced to writing and signed by the parties and in all other respects complies with the requirements of Chapter 50 of the General Statutes. However, no evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, or other neutral conducting a settlement proceeding under this section, shall be compelled to tes-

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tify or produce evidence concerning statements made and conduct occurring in a mediated settlement conference or other settlement procedure in any civil proceeding for any purpose, including proceedings to enforce a settlement of the action, except to attest to the signing of any of these agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators, and proceedings to enforce laws concerning juvenile or elder abuse.

- (6) **No Record Made.** There shall be no stenographic or other record made of any proceedings under these Rules.
- (7) **Ex Parte Communication Prohibited.** Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.
- (8) **Duties of the Parties.**
 - (a) **Attendance.** All parties and attorneys shall attend other settlement procedures authorized by Rule 10 and ordered by the Court.
 - (b) **Finalizing Agreement.** If agreement is reached during the proceeding, the essential terms of the agreement shall be reduced to writing as a summary memorandum unless the parties have reduced their agreement to writing, signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to its terms. Within 30 days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate.
 - (c) **Payment of Neutral's Fee.** The parties shall pay the neutral's fee as provided by Rule 10.C.(12), except that no payment shall be required or paid for a judicial settlement conference.

- (9) Sanctions for Failure to Attend Other Settlement Procedures.** If any person required to attend a settlement proceeding fails to attend without good cause, the Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, neutral fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action, or the Court on its own motion, seeking sanctions against a party or attorney, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

- (10) Selection of Neutrals in Other Settlement Procedures.**

Selection By Agreement. The parties may select any person whom they believe can assist them with the settlement of their case to serve as a neutral in any settlement procedure authorized by these rules, except for judicial settlement conferences.

Notice of such selection shall be given to the Court and to the neutral through the filing of a motion to authorize the use of other settlement procedures at the scheduling conference or the court appearance when settlement procedures are considered by the Court. The notice shall be on an AOC form as set out in Rule 2 herein. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

If the parties are unable to select a neutral by agreement, then the Court shall deny the motion for authorization to use another settlement procedure and the court shall order the parties to attend a mediated settlement conference.

- (11) Disqualification of Neutrals.** Any party may move a Court of the district in which an action is pending for an order disqualifying the neutral; and, for good cause, such

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order shall be entered. Cause shall exist, but is not limited to circumstances where, if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) Compensation of Neutrals. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time. The parties shall not compensate a settlement judge.

(13) Authority and Duties of Neutrals.

(a) Authority of Neutrals.

(i) Control of Proceeding. The neutral shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the Proceeding. The neutral shall make a good faith effort to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral. In the absence of agreement, the neutral shall select the date and time for the proceeding. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(b) Duties of Neutrals.

(i) The neutral shall define and describe the following at the beginning of the proceeding:

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(1) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral and the participants;

- (ii) **Disclosure.** The neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.
- (iii) **Reporting Results of the Proceeding.** The neutral shall report the result of the proceeding to the Court in writing within ten (10) days in accordance with the provisions of Rules 11, 12 and 13 herein on an AOC form. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the neutral to provide statistical data for evaluation of other settlement procedures.
- (iv) **Scheduling and Holding the Proceeding.** It is the duty of the neutral to schedule the proceeding and conduct it prior to the completion deadline set out in the Court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral unless said time limit is changed by a written order of the Court.

Rule 11. RULES FOR NEUTRAL EVALUATION

- A. NATURE OF NEUTRAL EVALUATION.** Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of the merits of the case, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.
- B. WHEN CONFERENCE IS TO BE HELD.** As a guiding principle, the neutral evaluation conference should be held at an early stage of the case, after the time for the filing of answers has expired but in advance of the expiration of the discovery period.
- C. PRE-CONFERENCE SUBMISSIONS.** No later than twenty (20) days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evalua-

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tor with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than ten (10) days prior to the date established for the neutral evaluation conference to begin, any party may, but is not required to, send additional written information to the evaluator responding to the submission of an opposing party. The response furnished to the evaluator shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator, if he or she deems it necessary, may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) Evaluator's Opening Statement. At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The facts that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

- (2) **Oral Report to Parties by Evaluator.** In addition to the written report to the Court required under these rules, at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of the merits of the case, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefor. The evaluator shall not reduce his or her oral report to writing and shall not inform the Court thereof.
- (3) **Report of Evaluator to Court.** Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, whether or not an agreement was reached by the parties, and the name of the person designated to file judgments or dismissals concluding the action.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties at the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions. If the parties do not reach a settlement during such discussions, however, the evaluator shall complete the neutral evaluation conference and make his or her written report to the Court as if such settlement discussions had not occurred. If the parties reach agreement at the conference, they shall reduce their agreement to writing as required by Rule 10.C.(8)(b).

RULE 12. JUDICIAL SETTLEMENT CONFERENCE

- A. Settlement Judge.** A judicial settlement conference shall be conducted by a District Court Judge who shall be selected by the Chief District Court Judge. Unless specifically approved by the Chief District Court Judge, the District Court Judge who presides over the judicial settlement conference shall not be assigned to try the action if it proceeds to trial.
- B. Conducting the Conference.** The form and manner of conducting the conference shall be in the discretion of the settle-

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ment judge. The settlement judge may not impose a settlement on the parties but will assist the parties in reaching a resolution of all claims.

C. Confidential Nature of the Conference. Judicial settlement conferences shall be conducted in private. No stenographic or other record may be made of the conference. Persons other than the parties and their counsel may attend only with the consent of all parties. The settlement judge will not communicate with anyone the communications made during the conference, except that the judge may report that a settlement was reached and, with the parties' consent, the terms of that settlement.

D. Report of Judge. Within ten (10) days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, whether or not an agreement was reached by the parties, and the name of the person designated to file judgments or dismissals concluding the action.

RULE 13. LOCAL RULE MAKING

The Chief District Court Judge of any district conducting settlement procedures under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.4, implementing settlement procedures in that district.

RULE 14. DEFINITIONS

(A) The word, Court, shall mean a judge of the District Court in the district in which an action is pending who has administrative responsibility for the action as an assigned or presiding judge, or said judge's designee, such as a clerk, trial court administrator, case management assistant, judicial assistant, and trial court coordinator.

(B) The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by AOC. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

- (C) The term, Family Financial Case, shall refer to any civil action in district court in which a claim for equitable distribution, child support, alimony, or post separation support is made, or in which there are claims arising out of contracts between the parties under GS 50-20(d), 52-10, 52-10.1 or 52B.

RULE 15. TIME LIMITS

Any time limit provided for by these rules may be waived or extended for good cause shown. Time shall be counted pursuant to the Rules of Civil Procedure.

In the Supreme Court of North Carolina
Order Adopting Amendments to the Rules Implementing
Statewide Mediated Settlement Conferences and Other
Settlement Procedures in Superior Court Civil Actions

WHEREAS, section 7A-38.1 of the North Carolina General Statutes establishes a program in superior court to provide for settlement procedures to expedite settlement of superior court civil actions, and

WHEREAS, N.C.G.S. 7A-38.1(c) provides for this Court to implement section 7A-38.1 by adopting rules and amendments to rules

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.1(c), Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions are hereby amended to read as in the following pages. These amended Rules shall be effective on the 21st of November, 2002.

Adopted by the Court in conference the 21st day of November, 2002. The Appellate Division Reporter shall publish the Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions in their entirety, as amended through this action, at the earliest practicable date.

Butterfield, J.
For the Court

**REVISED RULES IMPLEMENTING STATEWIDE MEDIATED
SETTLEMENT CONFERENCES AND OTHER SETTLEMENT
PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS**

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RULE 1. INITIATING SETTLEMENT EVENTS

**A. PURPOSE OF MANDATORY SETTLEMENT
PROCEDURES.**

Pursuant to G.S. 7A-38.1, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules, ~~including binding or non binding arbitration as permitted by law [see, for example, N.C.G.S. § 7A-37.1, Arb. Rule1(b).]~~

**B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND
OPPOSING COUNSEL CONCERNING SETTLEMENT
PROCEDURES.**

In furtherance of this purpose, counsel, upon being retained to represent any party to a superior court case, shall advise his or her client(s) regarding the settlement procedures approved by these Rules and shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

B.C. INITIATING THE MEDIATED SETTLEMENT CONFERENCE IN EACH ACTION BY COURT ORDER.

(1) Order by Senior Resident Superior Court Judge.

The Senior Resident Superior Court Judge of any judicial district may, by written order, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in a ~~any~~ civil action except an action in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license.

(2) Motion to authorize the use of other settlement procedures. The parties may move the Senior Resident Superior Court Judge to authorize the use of some other settlement procedure allowed by these rules or by local rule in lieu of a mediated settlement conference, as provided in G.S. 7A-38.1(i). Such motion shall be filed within 21 days of the order requiring a mediated settlement conference on an AOC form, and shall include:

- (a) the type of other settlement procedure requested;
- (b) the name, address and telephone number of the neutral selected by the parties;
- (c) the rate of compensation of the neutral;
- (d) that the neutral and opposing counsel have agreed upon the selection and compensation of the neutral selected;
- (e) that all parties consent to the motion.

If the parties are unable to agree to each of the above, then the Senior Resident Superior Court Judge shall deny the motion and the parties shall attend the mediated settlement conference as originally ordered by the Court. Otherwise, the court may order the use of any agreed upon settlement procedures authorized by Rules 10-12 herein or by local rules of the Superior Court in the county or district where the action is pending.

~~(2)~~(3) Timing of the order. The Senior Resident Superior Court Judge shall issue the order requiring a mediated settlement conference as soon as practicable after the time for the filing of answers

has expired. Rules 1.C.(4) ~~B.(3)~~ and 3.B. herein shall govern the content of the order and the date of completion of the conference.

~~(3)~~**(4) Content of order.** The court's order shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on an AOC form.

~~(4)~~**(5) Motion for court ordered mediated settlement conference.** In cases not ordered to mediated settlement conference, any party may file a written motion with the Senior Resident Superior Court Judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing with the Senior Resident Superior Court Judge within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

~~(5)~~**(6) Motion to dispense with mediated settlement conference.** A party may move the Senior Resident Superior Court Judge to dispense with the mediated settlement conference ordered by the Judge. Such motion shall state the reasons the relief is sought. For good cause shown, the Senior Resident Superior Court Judge may grant the motion.

~~(6) Motion to authorize the use of other settlement procedures.~~ A party may move the Senior Resident Superior Court Judge to authorize the use of some other settlement procedure in lieu of a mediated settlement conference. Such motion shall state the reasons the authorization is

~~requested and that all parties consent to the motion. The Court may order the use of any agreed upon settlement procedure authorized by Supreme Court or local rules. The deadline for completion of the authorized settlement procedure shall be as provided by rules authorizing said procedure or, if none, the same as ordered for the mediated settlement conference.~~

C.D. INITIATING THE MEDIATED SETTLEMENT CONFERENCE BY LOCAL RULE.

- (1) Order by local rule.** In judicial districts in which a system of scheduling orders or scheduling conferences is utilized to aid in the administration of civil cases, the Senior Resident Superior Court Judge of said districts may, by local rule, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in any civil action except an action in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license.
- (2) Scheduling orders or notices.** In judicial districts in which scheduling orders or notices are utilized to manage civil cases and for all cases ordered to mediated settlement conference by local rule, said order or notice shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.
- (3) Scheduling conferences.** In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to mediated settlement conferences by local rule, the notice for said scheduling conference shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to

select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

- (4) **Application of Rule 1.C.** The provisions of Rule 1.C.(2), (5) and (6) shall apply to Rule 1.D. except for the time limitations set out therein.
- (5) **Deadline for completion.** The provisions of Rule 3.B. determining the deadline for completion of the mediated settlement conference shall not apply to mediated settlement conferences conducted pursuant to Rule 1.D. The deadline for completion shall be set by the Senior Resident Superior Court Judge or designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline shall be well in advance of the trial date.
- (6) **Selection of mediator.** The parties may select and nominate, or the Senior Resident Superior Court Judge may appoint, mediators pursuant to the provisions of Rule 2., except that the time limits for selection, nomination, and appointment shall be set by local rule. All other provisions of Rule 2. shall apply to mediated settlement conferences conducted pursuant to Rule 1.D.
- (7) **Use of other settlement procedures.** The parties may utilize other settlement procedures pursuant to the provisions of Rule 1.C.(2) and Rule 10. However, the time limits and method of moving the court for approval to utilize another settlement procedure set out in those rules shall not apply and shall be governed by local rule.

RULE 2. SELECTION OF MEDIATOR

- A. SELECTION OF CERTIFIED MEDIATOR BY AGREEMENT OF THE PARTIES.** The parties may select a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Notice of Selection of Mediator by

Agreement within 21 days of the court's order, however, any party may file the notice. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on an AOC form.

- B. NOMINATION AND COURT APPROVAL OF A NON-CERTIFIED MEDIATOR.** The parties may select a mediator who does not meet the certification requirements of these Rules but who, in the opinion of the parties and the Senior Resident Superior Court Judge, is otherwise qualified by training or experience to mediate the action and who agrees to mediate indigent cases without pay.

If the parties select a non-certified mediator, the plaintiff's attorney shall file with the court a Nomination of Non-Certified Mediator within 21 days of the court's order. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and opposing counsel have agreed upon the selection and rate of compensation.

The Senior Resident Superior Court Judge shall rule on said nomination without a hearing, shall approve or disapprove of the parties' nomination and shall notify the parties of the court's decision. The nomination and approval or disapproval of the court shall be on an AOC form.

- C. APPOINTMENT OF MEDIATOR BY THE COURT.** If the parties cannot agree upon the selection of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the Senior Resident Superior Court Judge appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall be on an AOC form. ~~The motion shall state whether any party prefers a certified attorney mediator, and if so, the Senior Resident Judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified, non-attorney mediator, and if so, the Senior Resident Judge shall appoint a certified non-~~

~~attorney mediator if one is on the list of certified mediators desiring to mediate cases in the district. If no preference is expressed, the Senior Resident Judge may appoint a certified attorney mediator or certified non attorney mediator.~~

Upon receipt of a motion to appoint a mediator, or in the event the plaintiff's attorney has not filed a Notice of Selection or Nomination of Non-Certified Mediator with the court within 21 days of the court's order, the Senior Resident Superior Court Judge shall appoint a mediator, certified pursuant to these Rules, under a procedure established by said Judge and set out in Local Rules ~~or other written document~~. Only mediators who agree to mediate indigent cases without pay shall be appointed.

The Dispute Resolution Commission shall furnish for the consideration of ~~the Senior Resident Superior Court Judge(s) of any district where mediated settlement conferences are authorized to be held, the names, addresses and phone numbers of those certified mediators who want to be appointed in said district~~ a list of those certified superior court mediators who request appointments in said district. Said list shall contain the mediators' names, addresses and telephone numbers and shall be provided in writing or on the Commission's web site.

- D. MEDIATOR INFORMATION DIRECTORY.** To assist the parties in the selection of a mediator by agreement, the Senior Resident Superior Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all certified mediators who wish to mediate cases in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Superior Court in such county.
- E. DISQUALIFICATION OF MEDIATOR.** Any party may move the Senior Resident Superior Court Judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

- A. WHERE CONFERENCE IS TO BE HELD.** Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.
- B. WHEN CONFERENCE IS TO BE HELD.** As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The court's order issued pursuant to Rule 1.C.(1) shall state a deadline for completion for the conference which shall be not less than 120 days nor more than 180 days after issuance of the court's order. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

- C. REQUEST TO EXTEND DEADLINE FOR COMPLETION.** A party, or the mediator, may request the Senior Resident Superior Court Judge to extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the office of the Senior Resident Superior Court Judge.

The Senior Resident Superior Court Judge may grant the request by setting a new deadline for the completion of the conference, which date may be set at any time prior to trial. Notice of the Judge's action shall be served immediately on all parties and the mediator by the person who sought the extension and shall be filed with the court.

- D. RECESSES.** The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the conference.
- E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS.** The mediated settlement conference shall not be cause for the delay of other pro-

ceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) **Parties.**

(i) All individual parties.

(ii) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action;

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(b) **Insurance company representatives.** A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each such carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(c) **Attorneys.** At least one counsel of record for each party or other participant, whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C. or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(a) By agreement of all parties and persons required to attend and the mediator; or

(b) By order of the Senior Resident Superior Court Judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

B. NOTIFYING LIEN HOLDERS. Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request said lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

C. FINALIZING AGREEMENT. If an agreement is reached ~~in~~ at the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

D. PAYMENT OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule 7.

E. RELATED CASES. Upon application by any party or person, the Senior Resident Superior Court Judge may order that an attorney of record or a party in a pending Superior Court Case or a representative of an insurance carrier that may be liable for all or any part of a claim pending in Superior Court shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance

ordered pursuant to this rule. Any such attorney, party or carrier representative that properly attends a mediation conference pursuant to this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issues concerning an order entered pursuant to this rule shall be determined by the Senior Resident Superior Court Judge who entered the order.

DRC COMMENTS TO RULE 4

DRC Comment to Rule 4.C.

N.C.G.S. § 7A-38.1(1) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

DRC Comment to Rule 4.E.

Rule 4.E. was adopted to clarify a Senior Resident Superior Court Judge's authority in those situations where there may be a case related to a Superior Court case pending in a different forum. For example, it is common for there to be claims asserted against a third-party tortfeasor in a Superior Court case at the same time that there are related workers' compensation claims being asserted in an Industrial Commission case. Because of the related nature of such claims, the parties in the Industrial Commission case may need an attorney of record, party, or insurance carrier representative in the Superior Court case to attend the Industrial Commission mediation conference in order to resolve the pending claims in that case. Rule 4.E. specifically authorizes a Senior Resident Superior Court Judge to order such attendance provided that all parties in the related Industrial Commission case consent and the persons ordered to attend receive reasonable notice. The Industrial Commission's Rules for Mediated Settlement and Neutral Evaluation Conferences contain a similar provision ~~which that~~ provides that persons involved in an Industrial Commission case may be ordered to attend a mediation conference in a related Superior Court Case.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES. If a party or other person required to attend a mediated settlement conference fails to attend without good cause, ~~the Senior Resident Superior Court Judge~~ a resident or presiding Superior Court Judge, may impose upon the party or person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law. (See also Rule 7.ƐG. and the Comment to Rule 7.ƐG.)

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

- (1) **Control of conference.** The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court which shall contain a provision prohibiting mediators from prolonging a conference unduly.
- (2) **Private consultation.** The mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.
- (3) **Scheduling the conference.** The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. DUTIES OF MEDIATOR.

- (1) The mediator shall define and describe the following at the beginning of the conference:
 - (a) The process of mediation;
 - (b) The differences between mediation and other forms of conflict resolution;
 - (c) The costs of the mediated settlement conference;
 - (d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

- (e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;
 - (f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;
 - (g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1;
 - (h) The duties and responsibilities of the mediator and the participants; and
 - (i) That any agreement reached will be reached by mutual consent.
- (2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.
- (3) **Declaring impasse.** It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.
- (4) **Reporting results of conference.** The mediator shall report to the court on an AOC form within 10 days of the conference whether or not an agreement was reached by the parties. If an agreement was reached, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the person designated to file such consent judgment or dismissals. The mediator's report also shall inform the court of the absence of any party, attorney, or insurance representative known to the mediator to have been absent from the mediated settlement conference without permission. The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the Mediated Settlement Conference Program.
- (5) **Scheduling and holding the conference.** It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. The mediator shall make an effort to

schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

- (6) Distribution of mediator evaluation form.** At the mediated settlement conference, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per party with additional copies distributed upon request. The evaluation is intended for purposes of self-improvement and the mediator shall review returned evaluation forms.

RULE 7. COMPENSATION OF THE MEDIATOR

- A. BY AGREEMENT.** When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.
- B. BY COURT ORDER.** When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of \$125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of \$125 that is due upon appointment.
- C. CHANGE OF APPOINTED MEDIATOR.** Pursuant to Rule 2.A., the parties have twenty-one (21) days to select a mediator. Parties who fail to select a mediator within that time frame and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. If the court approves the substitution, the parties shall pay the court's original appointee the \$125 one time, per case administrative fee provided for in Rule 7.B.
- D. INDIGENT CASES.** No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the Senior Resident Superior Court Judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, sub-

sequent to the trial of the action. In ruling upon such motions, the Judge shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

E. POSTPONEMENT FEES. As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for the settlement conference has been agreed upon and scheduled by the parties and the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference. A conference may be postponed only after notice to all parties of the reason for the postponement, payment of a postponement fee to the mediator, and consent of the mediator and the opposing attorney. If a mediation is postponed within seven (7) business days of the scheduled date, the fee shall be \$125. If the settlement conference is postponed within three (3) business days of the scheduled date, the fee shall be \$250. Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

F. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the conference.

G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Senior Resident Superior Court Judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by a Resident or Presiding Superior Court Judge.

DRC COMMENTS TO RULE 7**DRC Comment to Rule 7.B.**

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

DRC Comment to Rule 7.E.

Though MSC Rule 7.E. provides that mediators “shall” assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, unexpected and unavoidable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rule 7.F.

If a party is found by a Senior Resident Superior Court Judge to have failed to attend a mediated settlement conference without good cause, then the Court may require that party to pay the mediator’s fee and related expenses.

DRC Comment to Rule 7.G.

If the Mediated Settlement Conference Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. MSC Rule 7.G. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.E. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as Superior Court mediators. For certification, a person shall:

A. Have completed a minimum of 40 hours in a ~~t~~trial c~~Court~~ ~~m~~Mediation t~~Training~~ ~~p~~Program certified by the Dispute Resolution Commission; or have completed a 16 hour supplemental trial court mediation training certified by the Commission after having been certified by the Commission as a family financial mediator;

B. Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she:

(a) is either:

(i) a member in good standing of the North Carolina State Bar, pursuant to Title 27, N.C. Administrative Code, The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000, or

(ii) a member similarly in good standing of the Bar of another state; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney; and

(b) has at least five years of experience as a judge, practicing attorney, law professor and/or mediator, or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8.B.(1) or Rule 8.B.(2).

(2) A non-attorney may be certified if he or she has completed the following:

(a) a six hour training on North Carolina court organization, legal terminology, civil court proce-

dure, the attorney-client privilege, the unauthorized practice of law, and common legal issues arising in Superior Court cases, provided by a trainer certified by the Dispute Resolution Commission;

- (b) provide to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience claimed in Rule 8.B.(2)(c);
 - (c) one of the following; (i) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Dispute Resolution Commission; and after completing the 20 hour training, mediating at least 30 disputes, over the course of at least three years, or equivalent experience, and either a four year college degree or four years of management or administrative experience in a professional, business, or governmental entity; or (ii) ten years of management or administrative experience in a professional, business, or governmental entity.
 - (d) Observe three mediated settlement conferences meeting the requirements of Rule 8.C. conducted by at least two different certified mediators, in addition to those required by Rule 8.C.
- C. Observe two mediated settlement conferences conducted by a certified Superior Court mediator;
 - (1) at least one of which must be court ordered by a Superior Court,
 - (2) the other may be a mediated settlement conference conducted under rules and procedures substantially similar to those set out herein, in cases pending in the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, North Carolina Superior Court or the United States District Courts for North Carolina.
- D. Demonstrate familiarity with the statute, rules, and practice governing mediated settlement conferences in North Carolina;

- E. Be of good moral character and adhere to any ~~ethical standards hereafter~~ of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. Applicants for certification and re-certification and all certified Superior Court mediators shall report to the Commission any criminal convictions, disbarments or other disciplinary complaints and actions as soon as the applicant or mediator has notice of them;
- F. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;
- G. Pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission; ~~and~~
- H. Agree to ~~mediate indigent cases without pay; and accept as payment in full of a party's share of the mediator's fee, the fee ordered by the Court pursuant to Rule 7;~~
- I. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include completion of training or self-study designed to improve a mediator's communication, negotiation, facilitation or mediation skills; completion of observations; service as a mentor to a less experienced mediator; being mentored by a more experienced mediator; or serving as a trainer. Mediators shall report on a Commission approved form.)

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

- A. Certified training programs for mediators ~~of Superior Court civil actions~~ seeking only certification as Superior Court mediators shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:
 - (1) Conflict resolution and mediation theory;

- (2) Mediation process and techniques, including the process and techniques of trial court mediation;
- (3) Communication and information gathering skills.
- ~~(3)~~(4) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct adopted by the Supreme Court;
- ~~(4)~~(5) Statutes, rules, and practice governing mediated settlement conferences in North Carolina;
- ~~(5)~~(6) Demonstrations of mediated settlement conferences;
- ~~(6)~~(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and
- (7)(8) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. Certified training programs for mediators who are already certified as family financial mediators shall consist of a minimum of sixteen hours. The curriculum of such programs shall include the subjects in Rule 9.A. and discussion of the mediation and culture of insured claims. There shall be at least two simulations as specified in subsection (7).

B.C. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

G.D. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES. Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Senior Resident Superior Court Judge may order the use of the procedure requested under these rules or under local rules unless the court finds that the parties did not agree upon all of the relevant details of the procedure, (including items a-e in Rule 1.C.(2)); or that for good cause, the selected procedure is not appropriate for the case or the parties.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES. In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) **Neutral Evaluation (Rule 11).** Neutral evaluation in which a neutral offers an advisory evaluation of the case following summary presentations by each party.

(2) **Arbitration (Rule 12).** Non-Binding Arbitration, in which a neutral renders an advisory decision following summary presentations of the case by the parties and Binding Arbitration, in which a neutral renders a binding decision following presentations by the parties.

(3) **Summary Trials (Jury or Non-Jury) (Rule 13).** Non-binding summary trials, in which a privately procured jury or presiding officer renders an advisory verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer; and binding summary trials, in which a privately procured jury or presiding officer renders a binding verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer.

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) **When proceeding is conducted.** Other settlement procedures ordered by the court pursuant to these rules shall be conducted no later than the date of completion set out in the court's original mediated settlement conference order unless extended by the Senior Resident Superior Court Judge.

(2) **Authority and duties of neutrals.**

(a) **Authority of neutrals.**

- (i) **Control of proceeding.** The neutral shall at all times be in control of the proceeding and the procedures to be followed.
- (ii) **Scheduling the proceeding.** The neutral shall attempt to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral. In the absence of agreement, the neutral shall select the date for the proceeding.

(b) **Duties of neutrals.**

- (i) **The neutral shall define and describe the following at the beginning of the proceeding.**
 - (a) **The process of the proceeding;**
 - (b) **The differences between the proceeding and other forms of conflict resolution;**
 - (c) **The costs of the proceeding;**
 - (d) **The inadmissibility of conduct and statements as provided by G. S 7A-38.1(l) and Rule 10.C.(6) herein; and**
 - (e) **The duties and responsibilities of the neutral and the participants.**
- (ii) **Disclosure.** The neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice, or partiality.
- (iii) **Reporting results of the proceeding.** The neutral shall report the result of the proceeding to the court in writing in accordance with the provisions of Rules 11 and 12, herein, on an AOC form. The Administrative Office of the Courts may require the neutral to provide statistical data for evaluation of other settlement procedures on forms provided by it.
- (iv) **Scheduling and holding the proceeding.** It is the duty of the neutral to schedule the proceeding and conduct it prior to the completion

deadline set out in the court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

- (3) **Extensions of time.** A party or a neutral may request the Senior Resident Superior Court Judge to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. If the court grants the motion for an extension, this order shall set a new deadline for the completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.
- (4) **Where procedure is conducted.** The neutral shall be responsible for reserving a place agreed to by the parties, setting a time, and making other arrangements for the proceeding, and for giving timely notice to all attorneys and unrepresented parties in writing of the time and location of the proceeding.
- (5) **No delay of other proceedings.** Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.
- (6) **Inadmissibility of settlement proceedings.** Evidence of statements made and conduct occurring in a settlement proceeding shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim, except in proceedings for sanctions or proceedings to enforce a settlement of the action. However, no evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No neutral shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a settlement proceeding in any civil proceeding for any purpose, including proceedings to enforce a settlement of the action, except to attest to the signing of any such agreements, and except proceedings for sanc-

tions under this section, disciplinary proceedings of the State Bar, disciplinary proceedings of any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

- (7) **No record made.** There shall be no record made of any proceedings under these Rules unless the parties have stipulated to binding arbitration or binding summary trial in which case any party after giving adequate notice to opposing parties may record the proceeding.
- (8) **Ex parte communication prohibited.** Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.
- (9) **Duties of the parties.**
 - (a) **Attendance.** All persons required to attend a mediated settlement conference pursuant to Rule 4 shall attend any other settlement procedure which is non-binding in nature, authorized by these rules, and ordered by the court except those persons to whom the parties agree and the Senior Resident Superior Court judge excuses. Those persons required to attend other settlement procedures which are binding in nature, authorized by these rules, and ordered by the court shall be those persons to whom the parties agree.

Notice of such agreement shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the Order requiring a mediated settlement conference. The notice shall be on an AOC form.

- (b) **Finalizing agreement.** If an agreement is reached in the proceeding, the parties to the agreement shall reduce its terms to writing, and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. A consent judgment or one or more voluntary dismissals shall be filed

with the court by such persons as the parties shall designate.

- (c) **Payment of neutral's fee.** The parties shall pay the neutral's fee as provided by Rule 10.C.(12).

- (10) **Selection of neutrals in other settlement procedures.** The parties may select any individual to serve as a neutral in any settlement procedure authorized by these rules. For arbitration, the parties may select either a single arbitrator or a panel of arbitrators. Notice of such selection shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the Order requiring a mediated settlement conference.

The notice shall be on an AOC form. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

- (11) **Disqualification.** Any party may move a Resident or Presiding Superior Court Judge of the district in which an action is pending for an order disqualifying the neutral; and for good cause, such order shall be entered. Cause shall exist if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

- (12) **Compensation of the neutral.** A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparing for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time.

Unless otherwise ordered by the court or agreed to by the parties, the neutral's fees shall be paid in equal shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented by the same counsel. The presiding officer and jurors in a summary jury trial are neutrals within the meaning of these Rules and shall be compensated by the parties.

- (13) **Sanctions for failure to attend other settlement procedures.** If any person required to attend a settlement procedure fails to attend without good cause, a Resident or Presiding Judge may impose upon the person any appropriate monetary sanction including but not limited to, the payment of fines, reimbursement of a party's attorney fees, expenses, and share of the neutral's fee and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against a person, or a Resident or Presiding Judge upon his/her own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 11. RULES FOR NEUTRAL EVALUATION

- A. **NATURE OF NEUTRAL EVALUATION.** Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing candid assessment of liability, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.
- B. **WHEN CONFERENCE IS TO BE HELD.** As a guiding principle, the neutral evaluation conference should be held at an early stage of the case after the time for the filing of answers has expired but in advance of the expiration of the discovery period.
- C. **PRE-CONFERENCE SUBMISSIONS.** No later than twenty (20) days prior the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the

party's case, shall not be more than five (5) pages in length, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than ten (10) days prior to the date established for the neutral evaluation conference to begin any party may, but is not required to, send additional written information not exceeding three (3) pages in length to the evaluator, responding to the submission of an opposing party. The response shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) Evaluator's opening statement. At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the Parties.

(2) Oral report to parties by evaluator. In addition to the written report to the Court required under these rules, at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of liability, estimated

settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefore. The evaluator shall not reduce his or her oral report to writing, and shall not inform the Court thereof.

- (3) **Report of evaluator to court.** Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, whether or not an agreement was reached by the parties and the name of the person designated to file judgments or dismissals concluding the action.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties to the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions.

- I. FINALIZING AGREEMENT.** If before the conclusion of the neutral evaluation conference and the evaluator's report to the Court the parties are able to reach a settlement of their claims, the parties shall reduce the agreement to writing and sign it along with their counsel. A consent judgment or one or more voluntary dismissals shall be filed with the Court by such persons as the parties shall designate.

RULE 12. RULES FOR ARBITRATION

In this form of settlement procedure the parties select an arbitrator who shall hear the case and enter an advisory decision. The arbitrator's decision is made to facilitate the parties' negotiation of a settlement and is non-binding, unless neither party timely requests a trial *de novo*, in which case the decision is entered by the Senior Resident Superior Court Judge as a judgment, or the parties agree that the decision shall be binding.

A. ARBITRATORS.

- (1) **Arbitrator's Canon of Ethics.** Arbitrators shall comply with the Canons of Ethics for Arbitrators promulgated by the Supreme Court of North Carolina. Arbitrators shall be disqualified and must recuse themselves in accordance with the Canons.

B. EXCHANGE OF INFORMATION.

- (1) **Pre-hearing exchange of information.** At least 10 days before the date set for the arbitration hearing the parties shall exchange in writing:
 - (a) Lists of witnesses they expect to testify.
 - (b) Copies of documents or exhibits they expect to offer into evidence.
 - (c) A brief statement of the issues and contentions of the parties.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing. Each party shall bring to the hearing and provide to the arbitrator a copy of these materials. These materials shall not be filed with the court or included in the case file.

- (2) **Exchanged documents considered authenticated.** Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian, or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.
- (3) **Copies of exhibits admissible.** Copies of exchanged documents or exhibits are admissible in arbitration hearings, in lieu of the originals.

C. ARBITRATION HEARINGS.

- (1) **Witnesses.** Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.
- (2) **Subpoenas.** Rule 45 of the North Carolina Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

- (3) **Motions.** Designation of an action for arbitration does not affect a party's right to file any motion with the court.
 - (a) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions referred to the arbitrator in the exchange of information required by Rule 12.B.(1).
 - (b) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.
- (4) **Law of evidence used as guide.** The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.
- (5) **Authority of arbitrator to govern hearings.** Arbitrators shall have the authority of a trial Judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all matters involving contempt to the Senior Resident Superior Court Judge.
- (6) **Conduct of hearing.** The arbitrator and the parties shall review the list of witnesses, exhibits and written statements concerning issues previously exchanged by the parties pursuant to Rule 12.B.(1), above. The order of the hearing shall generally follow the order at trial with regard to opening statements and closing arguments of counsel, direct and cross examination of witnesses and presentation of exhibits. However, in the arbitrator's discretion the order may be varied.
- (7) **No Record of hearing made.** No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.
- (8) **Parties must Be present at hearings; Representation.** Subject to the provisions of Rule 10.C.(9), all parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbi-

trator. All parties may be represented by counsel. Parties may appear *pro se* as permitted by law.

- (9) **Hearing concluded.** The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing has been concluded.

D. THE AWARD.

- (1) **Filing the award.** The award shall be in writing, signed by the arbitrator and filed with the Clerk of the Superior Court in the County where the action is pending, with a copy to the Senior Resident Superior Court Judge within twenty (20) days after the hearing is concluded or the receipt of post-hearing briefs, whichever is later. An award form, which shall be an AOC form, shall be used by the arbitrator as its report to the court and may be used to record its award.
- (2) **Findings; Conclusions; Opinions.** No findings of fact and conclusions of law or opinions supporting an award are required.
- (3) **Scope of award.** The award must resolve all issues raised by the pleadings, may be in any amount supported by the evidence, shall include interest as provided by law, and may include attorney's fees as allowed by law.
- (4) **Costs.** The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.
- (5) **Copies of award to parties.** The arbitrator shall deliver a copy of the award to all of the parties or their counsel at the conclusion of the hearing or the arbitrator shall serve the award after filing. A record shall be made by the arbitrator of the date and manner of service.

E. TRIAL DE NOVO.

- (1) **Trial de novo as of right.** Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial de novo as of right upon filing a written demand for trial de novo with the court, and service of the demand on all

parties, on an AOC form within 30 days after the arbitrator's award has been served. Demand for jury trial pursuant to N.C.R.Civ.P. 38(b) does not preserve the right to a trial *de novo*. A demand by any party for a trial *de novo* in accordance with this section is sufficient to preserve the right of all other parties to a trial *de novo*. Any trial *de novo* pursuant to this section shall include all claims in the action.

- (2) **No reference to arbitration in presence of jury.** A trial *de novo* shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the court's approval.

F. JUDGMENT ON THE ARBITRATION DECISION.

- (1) **Termination of action before judgment.** Dismissals or a consent judgment may be filed at any time before entry of judgment on an award.
- (2) **Judgment entered on award.** If the case is not terminated by dismissal or consent judgment, and no party files a demand for trial *de novo* within 30 days after the award is served, the Senior Resident Superior Court Judge shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be served on all parties or their counsel.

G. AGREEMENT FOR BINDING ARBITRATION.

- (1) **Written agreement.** The arbitrator's decision may be binding upon the parties if all parties agree in writing. Such agreement may be made at any time after the order for arbitration and prior to the filing of the arbitrator's decision. The written agreement shall be executed by the parties and their counsel, and shall be filed with the Clerk of Superior Court and the Senior Resident Superior Court Judge prior to the filing of the arbitrator's decision.
- (2) **Entry of judgment on a binding decision.** The arbitrator shall file the decision with the Clerk of Superior Court and it shall become a judgment in the same manner as set out in G.S. 1-567.1 ff.

H. MODIFICATION PROCEDURE.

Subject to approval of the arbitrator, the parties may agree to modify the procedures required by these rules for court ordered arbitration.

RULE 13. RULES FOR SUMMARY TRIALS

In a summary bench trial, evidence is presented in a summary fashion to a presiding officer, who shall render a verdict. In a summary jury trial, evidence is presented in summary fashion to a privately procured jury, which shall render a verdict. The goal of summary trials is to obtain an accurate prediction of the ultimate verdict of a full civil trial as an aid to the parties and their settlement efforts.

Rule 23 of the General Rules of Practice also provides for summary jury trials. While parties may request of the Court permission to utilize that process, it may not be substituted in lieu of mediated settlement conferences or other procedures outlined in these rules.

A. PRE-SUMMARY TRIAL CONFERENCE.

Prior to the summary trial, counsel for the parties shall attend a conference with the presiding officer selected by the parties pursuant to Rule 10.C.(10). That presiding officer shall issue an order which shall:

- (1) Confirm the completion of discovery or set a date for the completion;
- (2) Order that all statements made by counsel in the summary trial shall be founded on admissible evidence, either documented by deposition or other discovery previously filed and served, or by affidavits of the witnesses;
- (3) Schedule all outstanding motions for hearing;
- (4) Set dates by which the parties exchange:
 - (a) A list of parties' respective issues and contentions for trial;
 - (b) A preview of the party's presentation, including notations as to the document (e.g. deposition, affidavit, letter, contract) which supports that evidentiary statement;
 - (c) All documents or other evidence upon which each party will rely in making its presentation; and

- (d) All exhibits to be presented at the summary trial.
- (5) Set the date by which the parties shall enter a stipulation, subject to the presiding officer's approval, detailing the time allowable for jury selection, opening statements, the presentation of evidence, and closing arguments (total time is usually limited to one day);
- (6) Establish a procedure by which private, paid jurors will be located and assembled by the parties if a summary jury trial is to held and set the date by which the parties shall submit agreed upon jury instructions, jury selection questionnaire, and the number of potential jurors to be questioned and seated;
- (7) Set a date for the summary jury trial; and
- (8) Address such other matters as are necessary to place the matter in a posture for summary trial.

B. PRESIDING OFFICER TO ISSUE ORDER IF PARTIES UNABLE TO AGREE. If the parties are unable to agree upon the dates and procedures set out in Section A. of this Rule, the presiding officer shall issue an order which addresses all matters necessary to place the case in a posture for summary trial.

C. STIPULATION TO A BINDING SUMMARY TRIAL. At any time prior to the rendering of the verdict, the parties may stipulate that the summary trial be binding and the verdict become a final judgment. The parties may also make a binding high/low agreement, wherein a verdict below a stipulated floor or above a stipulated ceiling would be rejected in favor of the floor or ceiling.

D. EVIDENTIARY MOTIONS. Counsel shall exchange and file motion in limine and other evidentiary matters, which shall be heard prior to the trial. Counsel shall agree prior to the hearing of said motions as to whether the presiding officer's rulings will be binding in all subsequent hearings or non-binding and limited to the summary trial.

E. JURY SELECTION. In the case of a summary jury trial, potential jurors shall be selected in accordance with the procedure set out in the pre-summary trial order. These jurors shall complete a questionnaire previously stipulated to by the parties. Eighteen jurors or such lesser number as the parties agree shall submit to questioning by the presiding officer and

each party for such time as is allowed pursuant to the Summary Trial Pre-trial Order. Each party shall then have three peremptory challenges, to be taken alternately, beginning with the plaintiff. Following the exercise of all peremptory challenges, the first twelve seated jurors, or such lesser number as the parties may agree, shall constitute the panel.

After the jury is seated, the presiding officer in his/her discretion, may describe the issues and procedures to be used in presenting the summary jury trial. The jury shall not be informed of the non-binding nature of the proceeding, so as not to diminish the seriousness with which they consider the matter and in the event the parties later stipulate to a binding proceeding.

F. PRESENTATION OF EVIDENCE AND ARGUMENTS OF COUNSEL. Each party may make a brief opening statement, following which each side shall present its case within the time limits set in the Summary Trial Pre-trial Order. Each party may reserve a portion of its time for rebuttal or surrebuttal evidence. Although closing arguments are generally omitted, subject to the presiding officer's discretion and the parties' agreement, each party may be allowed to make closing arguments within the time limits previously established.

Evidence shall be presented in summary fashion by the attorneys for each party without live testimony. Where the credibility of a witness is important, the witness may testify in person or by video deposition. All statements of counsel shall be founded on evidence that would be admissible at trial and documented by prior discovery.

Affidavits offered into evidence shall be served upon opposing parties far enough in advance of the proceeding to allow time for affiants to be deposed. Counsel may read portions of the deposition to the jury. Photographs, exhibits, documentary evidence and accurate summaries of evidence through charts, diagrams, evidence notebooks, or other visual means are encouraged, but shall be stipulated by both parties or approved by the presiding officer.

G. JURY CHARGE. In a summary jury trial, following the presentation of evidence by both parties, the presiding officer shall give a brief charge to the jury, relying on predetermined jury instructions and such additional instructions as the presiding officer deems appropriate.

- H. DELIBERATION AND VERDICT.** In a summary jury trial, the presiding officer shall inform the jurors that they should attempt to return a unanimous verdict. The jury shall be given a verdict form stipulated to by the parties or approved by the presiding officer. The form may include specific interrogatories, a general liability inquiry and/or an inquiry as to damages. If, after diligent efforts and a reasonable time, the jury is unable to reach a unanimous verdict, the presiding officer may recall the jurors and encourage them to reach a verdict quickly, and/or inform them that they may return separate verdicts, for which purpose the presiding officer may distribute separate forms.

In a summary bench trial, at the close of the presentation of evidence and arguments of counsel and after allowing time for settlement discussions and consideration of the evidence by the presiding officer, the presiding officer shall render a decision. Upon a party's request, the presiding officer may allow three business days for the filing of post-hearing briefs. If the presiding officer takes the matter under advisement or allows post-hearing briefs, the decision shall be rendered no later than ten days after the close of the hearing or filing of briefs whichever is longer.

- I. JURY QUESTIONING.** In a summary jury trial the presiding officer may allow a brief conference with the jurors in open court after a verdict has been returned, in order to determine the basis of the jury's verdict. However, if such a conference is used, it should be limited to general impressions. The presiding officer should not allow counsel to ask detailed questions of jurors to prevent altering the summary trial from a settlement technique to a form of pre-trial rehearsal. Jurors shall not be required to submit to counsels' questioning and shall be informed of the option to depart.
- J. SETTLEMENT DISCUSSIONS.** Upon the retirement of the jury in summary jury trials or the presiding officer in summary bench trials, the parties and/or their counsel shall meet for settlement discussions. Following the verdict or decision, the parties and/or their counsel shall meet to explore further settlement possibilities. The parties may request that the presiding officer remain available to provide such input or guidance as the presiding officer deems appropriate.
- K. MODIFICATION OF PROCEDURE.** Subject to approval of the presiding officer, the parties may agree to modify the procedures set forth in these Rules for summary trial.

- L. SETTLEMENT OF THE CASE.** In the event that the parties settle the case in the course of the summary trial, the presiding officer shall direct the parties to immediately prepare and sign a memorandum of settlement which shall be filed with the Clerk of Superior Court.

RULE 14. ~~40.~~ LOCAL RULE MAKING.

The Senior Resident Superior Court Judge of any district conducting mediated settlement conferences under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.1, implementing mediated settlement conferences in that district.

RULE 15. ~~44.~~ DEFINITIONS.

- A.** The term, Senior Resident Superior Court Judge, as used throughout these rules, shall refer both to said judge or said judge's designee.
- B.** The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the Administrative Office of the Courts. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

RULE 16. ~~42.~~ TIME LIMITS.

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the Rules of Civil Procedure.

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Preservation of issues—exclusion of testimony—no request to reconsider ruling—waiver—The defendant in a prosecution for indecent liberties and first-degree sexual offense waived the right to argue on appeal that the court erred by excluding testimony by a neighbor of the victim that the victim had falsely accused him of an improper touching four years earlier where defendant failed to request the court to reconsider its ruling prohibiting testimony by the neighbor after the court changed its earlier ruling to permit questioning of the victim about the prior accusation. **State v. Smith**, 514.

Preservation of issues—failure to address in assignment of error—Although taxpayer non-profit corporation contends that the Property Tax Commission erred when it displayed unfairness and prejudice to the taxpayer, this argument is dismissed because none of taxpayer's assignments of error address this issue. **In re Appeal of The Master's Mission**, 640.

Preservation of issues—failure to present in motion—failure to argue at hearing—Although defendant contends the trial court erred in a breach of contract action by failing to grant summary judgment based on plaintiff's alleged failure to show any damages, defendant did not preserve this issue for appeal because he did not present this ground in his motion to dismiss or argue it at the hearing. **McDonald v. Skeen**, 228.

Preservation of issues—failure to state specific grounds for objection—Although defendant contends the trial court erred in a trafficking in cocaine and knowingly maintaining a place to keep or sell a controlled substance case by overruling defendant's objection to a witness's statement regarding undercover drug purchases, defendant failed to preserve this issue because he lodged a general objection without stating the specific grounds for the ruling he desired the court to make. **State v. Moore**, 156.

APPEAL AND ERROR—Continued

Remand—law of the case—The superior court was free to change its conclusions on remand of a case involving the dismissal of a county health director where the remand was for reconsideration under the proper standard of appeal. The appellate court did not reach the merits and the trial court's first ruling was not the law of the case. **Steeves v. Scotland Cty. Bd. of Health, 400.**

ARBITRATION AND MEDIATION

Federal act—state act preempted—The Federal Arbitration Act (FAA) preempts the North Carolina Uniform Arbitration Act when the contract containing an arbitration clause involves interstate commerce. **Boynton v. ESC Med. Sys., Inc., 103.**

Forum selection clause—interstate agreement—An action for breach of a contract involving sales commissions was remanded for entry of an order granting defendant Luxar's motion to dismiss for failure to state a claim, with Luxar being free to seek arbitration in the State of Washington. The parties contemplated interstate commerce at the time their agreement was executed and the forum selection clause agreement in the arbitration provision was valid under the FAA. **Boynton v. ESC Med. Sys., Inc., 103.**

Mutual agreement—voluntary submission—The trial court did not err by denying defendant ESC's motions to dismiss and to compel arbitration where ESC was a successor corporation which merely volunteered for arbitration. A party seeking to compel arbitration must prove the existence of a mutual agreement to arbitrate; voluntary submission to arbitration opposed by the other party does not constitute mutual agreement. However, the action as to ESC was stayed pending resolution of arbitrable claims in the State of Washington. **Boynton v. ESC Med. Sys., Inc., 103.**

ATTACHMENT

Order dissolving—officer versus registered agent—due diligence—The trial court erred in a fraud, unjust enrichment, unfair and deceptive trade practices, and breach of contract case by filing an order on 25 July 2001 dissolving an attachment of property belonging to defendant even though plaintiff claimed it could not find defendant's assistant secretary in North Carolina but information filed with the North Carolina Secretary of State showed a registered agent for defendant with a North Carolina address because plaintiff could not have deduced from this information that the registered agent also served as defendant's assistant secretary. **Challenger Indus., Inc. v. 3-I, Inc., 711.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Underlying larceny charge dismissed—no evidence of intent—misdemeanor breaking or entering—A conviction for felonious breaking or entering could not stand where defendant's felonious larceny charge should have been dismissed and the State presented no evidence that defendant entered the mobile home with the intent to commit a felony or larceny. The case was remanded for sentencing for misdemeanor breaking or entering. **State v. Craycraft, 211.**

CHILD ABUSE AND NEGLECT

Stipulation of neglect—no evidentiary hearing—The trial court erred by entering a juvenile neglect adjudication in the absence of respondent father based upon the mother's stipulation of neglect without conducting an evidentiary hearing. **In re Shaw**, 126.

CHILD SUPPORT, CUSTODY, AND VISITATION

Custody—conclusions of law—A trial court's conclusions of law in a child custody case resulting in the custody to plaintiff non-parent second cousin over defendant biological mother were supported by the findings of fact. **Davis v. McMillian**, 53.

Custody—findings of fact—competent evidence—The trial court's findings of fact supporting the conclusion of defendant biological mother's unfitness in a child custody case between defendant biological mother and plaintiff non-parent second cousin were supported by competent evidence. **Davis v. McMillian**, 53.

Custody—grandparent—best interest of child—The trial court erred in a child custody case by performing a best interest of the child analysis between defendant father and plaintiff maternal grandmother and by granting plaintiff custody of the children based on the erroneous conclusion that defendant father acted inconsistently with his constitutionally protected status. **Grindstaff v. Byers**, 288.

Custody—judicial notice from prior custody action between biological parents—action between biological parent and non-parent—The trial court did not err in a child custody case by taking judicial notice under N.C.G.S. § 8C-1, Rule 201(b) of findings of fact of unfitness from a prior custody action between the biological parents to support an award of custody in this action in favor of plaintiff non-parent second cousin and against defendant biological mother. **Davis v. McMillian**, 53.

Custody—standing—grandparent—motion to dismiss—The trial court did not err by concluding that plaintiff maternal grandmother had standing to initiate an action for child custody on 28 February 2000 and by denying defendant father's Rule 12(b)(6) motion to dismiss. **Grindstaff v. Byers**, 288.

Support—adjustment of gross income for benefit of company car—The trial court did not abuse its discretion in a child support case by imputing \$250 per month to plaintiff father's gross income based on the benefit of his company car. **Leary v. Leary**, 438.

Support—attorney fees—action for arrearages after majority—The trial court made sufficient findings to support an award of attorney fees in a child support action where the mother filed the action to collect arrearages after the children had reached majority. Plaintiff is an interested party as defined by N.C.G.S. § 50-13.6 because she provided financial support in the absence of defendant. **Belcher v. Averette**, 452.

Support—request for deviation from guidelines—The trial court did not abuse its discretion in a child support case by denying plaintiff father's request for deviation from the Child Support Guidelines. **Leary v. Leary**, 438.

CITIES AND TOWNS

Annexation ordinances—identification of area—connection by street rights-of-way—public informational meeting—The trial court did not err by affirming annexation ordinances adopted by respondent city on 20 April 2000 because the city substantially complied with the statute requiring that the resolution identify the area under consideration for annexation and statutory requirements for a public informational meeting, and petitioners failed to show that areas were not connected by street rights-of way. **Anthony v. City of Shelby, 144.**

CIVIL PROCEDURE

Rule 60 motion—improper for seeking amendment or modification instead of relief—The trial court did not err in an equitable distribution case by denying defendant former wife's motion under N.C.G.S. § 1A-1, Rule 60 requesting a modification or an amendment of a 1998 qualifying order because defendant did not seek to be relieved of the judgment. **White v. White, 588.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Collateral estoppel—issue never litigated and determined—The trial court did not err in a breach of contract case by denying defendant's motion for summary judgment on the basis of collateral estoppel because the issue of defendant's agency was not litigated and determined in the prior case. **McDonald v. Skeen, 228.**

CONSTITUTIONAL LAW

Double jeopardy—possession of cocaine—sale—Double jeopardy was not violated where defendant was sentenced for both the sale and delivery of cocaine and possession of cocaine with intent to sell or deliver. **State v. Dickerson, 714.**

Due process—right to prepare defense—motion for continuance—The trial court in a second-degree murder case did not violate defendant's due process rights to present favorable evidence, to prepare a defense, and to introduce potentially exculpatory evidence, nor did it violate his right to effective assistance of counsel, by denying defendant's motions for a continuance. **State v. Marecek, 479.**

Effective assistance of counsel—failure to object to videotape—Defense counsel did not provide ineffective assistance of counsel in a prosecution for first-degree murder, armed robbery, and first-degree burglary by not objecting to the admission of a videotape of the body and not requiring the State to authenticate the videotape. **State v. Smith, 29.**

Effective assistance of counsel—tactical decision—A defendant in an assault with a deadly weapon with intent to kill inflicting serious injury, possession of cocaine, and possession of a firearm by a convicted felon case did not receive ineffective assistance of counsel by failing to call as a witness a psychiatrist who had examined defendant to offer testimony of defendant's mental illness to negate the mental state required for the offenses where the psychiatrist's report had concluded that defendant did know right from wrong at the time of the crime, the psychiatrist's testimony would not have necessarily helped defendant

CONSTITUTIONAL LAW—Continued

if he had been called as a witness, and there is no basis to conclude that counsel's decision not to call the psychiatrist as a witness at the trial was anything other than a sound tactical choice. **State v. Quick, 220.**

Right to counsel—advice of non-lawyer not included—The trial court did not err in a failure to produce a driver's license case by allegedly denying defendant his counsel of choice, namely the advice of a non-lawyer. **State v. Phillips, 679.**

Right to counsel—not invoked—There was no error in a murder prosecution where defendant contended that an officer continued to question him after he invoked his right to counsel. Defendant stated that he didn't know whether he needed a lawyer, the officer responded that he wanted to leave his statement as it was, the officer reviewed his notes with defendant and did not ask further questions, the statement was typed, and defendant reviewed it, made changes, and signed it. **State v. Lippard, 564.**

Right to counsel—Sixth Amendment—adversary proceedings not begun—A murder defendant's Sixth Amendment right to counsel was not violated where he was interviewed in New Orleans by North Carolina detectives without his attorney present even though his attorney had asked that defendant not be interviewed. Defendant had been arrested but not indicted and his Sixth Amendment right to counsel had not attached. Moreover, defendant had knowingly waived his rights; the State's provision of constitutionally sufficient information will not be defeated because a defendant does not fully appreciate the ramifications. **State v. Lippard, 564.**

Right to counsel—waiver—There was no error in a prosecution for driving while impaired and other offenses where defendant contested his waiver of his right to counsel but the judge's certification of defendant's signed waiver of counsel attested that defendant had been informed of all the statutory requirements and defendant never indicated a desire to be represented by counsel. **State v. Kinlock, 84.**

Right to counsel—waiver—The trial court did not err in a failure to produce a driver's license case by imposing a jail sentence even though defendant contends it was absent a voluntary waiver of counsel because defendant unequivocally refused to have a lawyer represent him. **State v. Phillips, 679.**

CONTEMPT

Refusal to stand in court—summary hearing required—A contempt order was reversed where a defendant who refused to stand when a recess was called was not given the statutorily required summary hearing before being found in contempt. Giving defendant the opportunity to explain himself after the fact is not sufficient. It was noted that defendant's actions were contemptuous and that judges must be allowed to maintain order, respect and proper function in their courtrooms. **State v. Randell, 469.**

CONTRACTS

Breach—failure to state a claim—The trial court did not err in a breach of contract action by granting third-party defendant's N.C.G.S. § 1A-1, Rule 12(c)

CONTRACTS—Continued

motion for judgment on the pleadings based on third-party plaintiff's failure to state a claim because an invalid indemnification provision in the contract is not severable and renders the entire contract invalid. **Jackson v. Associated Scaffolders & Equip. Co.**, 687.

Breach—motion to dismiss—sufficiency of evidence—The trial court erred by granting defendants' motions under N.C.G.S. § 1A-1, Rules 12(b)(6) and 12(c) regarding plaintiff club's claim for breach of contract against defendant development corporation and defendant partnership for failing to construct an 18-hole golf course of championship quality and for failing to construct a clubhouse with an HVAC system appropriate to the size and uses of the clubhouse. **Governor's Club, Inc. v. Governor's Club Ltd. P'ship**, 240.

Breach of implied covenant of good faith and fair dealing—motion to dismiss—sufficiency of evidence—The trial court erred by granting defendants' motions under N.C.G.S. § 1A-1, Rules 12(b)(6) and 12(c) regarding plaintiff club's claim for breach of implied covenant of good faith and fair dealing. **Governor's Club, Inc. v. Governor's Club Ltd. P'ship**, 240.

COSTS

Attorney fees—child support action—The trial court did not abuse its discretion in a child support case by awarding \$600 as reasonable attorney fees under N.C.G.S. § 50-13.6 to defendant mother. **Leary v. Leary**, 438.

Attorney fees—child support action—findings—The trial court in a child support action made sufficient findings regarding the reasonableness of attorney fees. **Belcher v. Averette**, 452.

Attorney fees—offers of judgment—judgment finally obtained—Plaintiff's motion for attorney fees in an automobile accident case pursuant to N.C.G.S. § 6-21.1 must be remanded for reconsideration where the trial court failed to consider offers of judgment made by defendant and the correct amount of the judgment finally obtained in denying the motion. **Phillips v. Warren**, 679.

Offer of judgment—prejudgment interest—judgment finally obtained—The trial court improperly omitted prejudgment interest on compensatory damages from the time an automobile accident suit was filed until entry of judgment in calculating the judgment finally obtained to determine whether such judgment was larger than defendant's Rule 68 lump sum offer of judgment which was refused by plaintiff and thus whether the offer of judgment tolled the accrual of prejudgment interest as of the date of the offer. **Phillips v. Warren**, 679.

Rule 68—amount of final judgment—The judgment finally obtained in a Rule 68 case consists of the verdict, costs, fees, interest, and any other assessed costs such as attorney fees. In this case, the total without attorney fees comes to \$8,448.47 (the verdict of \$6,000, costs of \$1,835.47, and interest which should have been awarded of \$613). **Phillips v. Warren**, 679.

Rule 68—post-offer costs—inclusion in judgment—The trial court erred in the calculation of costs in the determination of whether Rule 68 applied by not including post-offer costs in the judgment finally obtained. **Phillips v. Warren**, 679.

CRIMINAL LAW

Competency to stand trial—reluctance to produce witnesses—The trial court did not abuse its discretion in a rape and kidnapping prosecution by finding defendant competent to stand trial where a psychiatrist testified that defendant's paranoid delusions prevented him from effectively assisting his defense because he believed that anyone attempting to assist him would be hindered by a curse against him. The trial court could properly conclude from evidence presented at the hearing that defendant's reluctance to provide the names of potential witnesses did not otherwise preclude assisting in his defense. **State v. Pratt, 694.**

Failure to ask defendant for plea before jury empaneled—no undue prejudice—The trial court did not err in a failure to produce a driver's license case by failing to ask defendant for a plea before the jury had been empaneled. **State v. Phillips, 679.**

Guilty plea—motion to withdraw—denied—The trial court did not err by denying defendant's motion to withdraw a guilty plea to first-degree murder. **State v. Ager, 577.**

In personam jurisdiction—inability to limit appearance for purposes of challenging jurisdiction—The trial court did not lack in personam jurisdiction in a failure to produce a driver's license case even though defendant alleges invalid service of process and the fact that he limited his appearances for the purposes of challenging jurisdiction because defendant had no right to limit his appearance at trial in order to challenge jurisdiction, and defendant was lawfully served with a misdemeanor statement of charges. **State v. Phillips, 679.**

Instructions—definition of corroboration—The trial court did not err in a second-degree murder case by giving an instruction on implied admissions based on a witness's testimony that he stated to defendant that the witness knew defendant killed his wife, because defendant's reported failure to deny that he killed his wife, along with his incriminating statements, manifest circumstantially his assent to the truth of the witness's statement that defendant killed his wife. **State v. Love, 608.**

Instructions—doctrine of recent possession—The trial court did not err by instructing the jury on the doctrine of recent possession in a prosecution for burglary and robbery where defendant maintained that there was significant evidence of intervening agency. By its nature, the doctrine involves a gap in the evidence of possession of the stolen goods. **State v. Smith, 29.**

Instructions—duress—The trial court did not err in a prosecution for first-degree burglary and armed robbery by denying defendant's request for an instruction on duress where defendant had ample opportunity to avoid participation and made no attempt to contact police or surrender the stolen goods. **State v. Smith, 29.**

Instructions—implied admissions—The trial court did not err in a second-degree murder case by giving an instruction on implied admissions based on a witness's testimony that he stated to defendant that the witness knew defendant killed his wife, because defendant's reported failure to deny that he killed his wife, along with his incriminating statements, manifest circumstantially his assent to the truth of the witness's statement that defendant killed his wife. **State v. Marecek, 479.**

CRIMINAL LAW—Continued

Instructions—insanity—burden of proof—no prejudicial error—There was no prejudicial error in a first-degree murder prosecution where the instruction on insanity tendered by the State and given by the trial court erroneously included “not” in the second sentence. Viewed contextually, the entire instruction placed the burden on the State to prove each element of the offense beyond a reasonable doubt and then upon the defendant to prove his insanity to the jury’s satisfaction, and the mandate clearly instructed the jury that it would return a verdict of not guilty if it had a reasonable doubt as to any element of the offense or if it was satisfied defendant was insane. **State v. Hornsby, 358.**

Instructions—limiting instruction on prior offenses not given—no plain error—There was no plain error in a prosecution for driving while impaired and other offenses where the court did not give an instruction limiting consideration of prior offenses, but defendant did not request the instruction and the evidence against defendant was overwhelming. **State v. Kinlock, 84.**

Presence at trial—defendant nauseated—continuance denied—The trial court did not abuse a defendant’s right to be present at trial by refusing to grant a continuance and refusing to grant a mistrial where defendant complained of nausea, was examined by a doctor who recommended that the trial not continue that day, defendant was given medicine which he indicated made him sleepy, and the court made its decision based on personal observation of defendant. **State v. Smith, 514.**

Remark to juror by deputy—mistrial denied—The trial court did not abuse its discretion by not declaring a mistrial in a murder prosecution where a deputy made a derogatory remark to an alternate juror about defendant’s medical expert. The alternate juror was discharged, the remaining jurors examined, and the court found that there was nothing to indicate that any juror had been impaired. **State v. Lippard, 564.**

DAMAGES AND REMEDIES

Liquidated damages—failure to pay stock bonus—Although plaintiff contends the trial court erred by failing to award him liquidated damages under N.C.G.S. § 95-25.22(a1) based on defendants’ failure to pay plaintiff his stock bonus when plaintiff left the company, this issue is not addressed based on the Court of Appeals’ holding in the case. **Murphy v. First Union Capital Mkts. Corp., 205.**

Punitive damages—beating outside restaurant—corporate complicity—manager and bouncers standing by—The plaintiff in a negligence action originating in a beating outside a restaurant presented evidence sufficient to support a punitive damages claim against a corporate defendant where there was ample evidence that Bennet was a manager for defendant and stood by with two bouncers while plaintiff was repeatedly kicked as he lay helpless on the ground. **Miller v. B.H.B. Enters., Inc., 532.**

Punitive damages—impaired driving—issue of fact—Alco-Sensor test—The trial court erred by granting defendant’s motion for partial summary judgment on plaintiff’s claim for punitive damages arising from an automobile accident where plaintiff based his punitive damages claim on allegations of impaired driving and there was evidence that defendant fell asleep after consuming two

DAMAGES AND REMEDIES—Continued

beers and three prescription drugs, but an Alco-Sensor test indicated that defendant's blood-alcohol level was not above the legal limit. Neither the Alco-Sensor test nor the trooper's observations of defendant are determinative as to whether defendant was impaired in this case. **Byrd v. Adams, 460.**

Punitive damages—sufficiency of evidence—bouncers not halting beating—The trial court did not err in an action originating in a beating outside a restaurant by denying the restaurant owner's motion for a directed verdict on punitive damages based on allegedly insufficient evidence that defendant's employees acted willfully and wantonly. **Miller v. B.H.B. Enters., Inc., 532.**

DISCOVERY

Irrelevant and overly broad requests—denied—no abuse of discretion—The trial court did not abuse its discretion in denying defendant's motion to compel discovery a request for discovery when considering a motion for attorney fees in a child support action because some of the request was irrelevant and the trial court could have concluded that a request for tax returns and financial statements for three and five years respectively was overly broad, burdensome, and oppressive, given the scope of the issue before the court. **Belcher v. Averette, 452.**

Lab reports—motion to suppress—failure to disclose prior to trial—The trial court did not abuse its discretion in a trafficking in cocaine and knowingly maintaining a place to keep or sell a controlled substance case by refusing to suppress lab reports and the testimony of two SBI lab agents, or by failing to dismiss the charges based on the State's failure to disclose the lab reports prior to trial, because defendant was offered a continuance to have independent lab testing, and defendant was allowed time to review the lab reports and conduct a voir dire of the lab agents. **State v. Moore, 156.**

Late revelation—failure to disclose defendant's statements—The trial court did not abuse its discretion in a first-degree sexual offense and first-degree kidnapping of a female minor case by overruling defendant's objections to the admission of statements he made that were allegedly not provided to him through discovery where the trial testimony was substantially similar to what in substance was provided to defendant during discovery. **State v. Love, 608.**

DIVORCE

Alimony—dependent spouse—permanently adjudicated at initial hearing—In an order terminating alimony, the trial court improperly concluded that defendant was no longer a dependent spouse because that issue was permanently adjudicated during the initial alimony hearing. The court may reduce the amount of alimony to zero if a change of circumstances is found to exist. **Honeycutt v. Honeycutt, 673.**

Alimony—earning capacity—not investment potential or social security—The findings in an order terminating alimony did not address plaintiff's earning capacity where they referred to potential investment income and social security rather than earning capacity from working. **Honeycutt v. Honeycutt, 673.**

DIVORCE—Continued

Equitable distribution—finding—value of property at date of distribution—The trial court erred in an equitable distribution action by not making findings about the value of real property tracts on the date of distribution even though there was evidence that the values changed after the parties separated. **Edwards v. Edwards, 185.**

Equitable distribution—hunting lodge—division of property—In an equitable distribution action in which the marital estate consisted almost entirely of a hunting lodge and surrounding real estate, the trial court did not abuse its discretion by awarding defendant the lodge, which was also her residence, but not the acreage, which defendant considered necessary for the hunting business. There was evidence supporting findings that neither party could buy out the other; it appears from the record that the court sought the highest distributive awards possible. **Edwards v. Edwards, 185.**

Equitable distribution—military retirement pension—The trial court erred in an equitable distribution case by denying defendant former wife's motion in the cause requesting the trial court to enter a modified or amended qualifying order increasing defendant's percentage of plaintiff former husband's retired military pay for as long as the pension remains reduced due to plaintiff's subsequent election of a disability payment that waived a portion of his retirement pay. **White v. White, 588.**

Equitable distribution—post-separation expenses—The trial court did not err in an equitable distribution action by not including defendant's evidence of post-separation expenses where the court rejected defendant's evidence as insufficiently credible. **Edwards v. Edwards, 185.**

Equitable distribution—valuations of property—The trial court did not err in an equitable distribution action where defendant contended that the court did not accept defendant's valuations of personal property, but comparison of the court's order with defendant's evidence indicates that the court accepted defendant's valuations for many items. **Edwards v. Edwards, 185.**

Foreign judgment—title to real property—severability—full faith and credit—Although a Kansas divorce judgment attempted to determine the title to real property in North Carolina and it is accepted law in North Carolina that courts of one state cannot determine title to real property located in another state, that part of the judgment is severable and our courts are required to give full faith and credit to the remainder of the Kansas divorce judgment. **Buchanan v. Weber, 180.**

Separation agreement—ratification—The trial court erred by granting summary judgment for defendant as to plaintiff's ratification of a separation agreement where there was evidence from which a jury could find that plaintiff signed the agreement under duress which continued until her husband's death, an affidavit from a psychologist could lead to the conclusion that plaintiff lacked full understanding of the agreement and was thus incapable of ratifying it, and plaintiff's deposition testimony was equivocal regarding her understanding of the agreement. **Goodwin v. Webb, 650.**

DRUGS

Maintaining vehicle for drug sales—isolated incident—The trial court erred by not dismissing a charge of keeping or maintaining a motor vehicle for the sale or delivery of cocaine where defendant was in his vehicle on one occasion when cocaine was sold. **State v. Dickerson, 714.**

EASEMENTS

Appealability—denial of preliminary injunction—servient holder blocking dominant use—There is no per se deprivation of a substantial right where the servient estate holder obstructs an easement and it cannot be concluded that these plaintiffs will be irreparably injured by the denial of a preliminary injunction. **McColl v. Anderson, 191.**

EAVESDROPPING

Electronic Surveillance Act—illegal recording of in-home conversations and actions—The trial court erred in an action arising out of defendant wife's illegal recording of plaintiff husband's in-home conversations and actions by granting plaintiff husband partial summary judgment on his Electronic Surveillance Act claim because there was no evidence that the videotapes included an audio recording, and a custodial parent may vicariously consent to the recording of a minor child's conversations to protect the child. **Kroh v. Kroh, 347.**

EMOTIONAL DISTRESS

Intentional infliction—sexual harassment—behavior juvenile but not extreme—The trial court did not err by granting summary judgment for defendants on a claim for intentional infliction of emotional distress (IIED) involving alleged workplace sexual harassment where the alleged behavior was annoyingly juvenile, obnoxious, and offensive, but not outrageous and extreme. **Guthrie v. Conroy, 15.**

Negligent infliction—sexual harassment by co-worker—no breach of duty—The trial court did not err by granting summary judgment for defendants on plaintiff's claim for negligent infliction of emotional distress (NIED) arising from alleged workplace sexual harassment where plaintiff did not allege a duty owed to her by the co-employee who was allegedly harassing her. While NIED does not require extreme and outrageous conduct, negligence involves the breach of a duty. **Guthrie v. Conroy, 15.**

State employee—workplace harassment—outrageous conduct—foreseeability—insufficient evidence—The trial court correctly granted summary judgment for defendants Florence and Daughtry on plaintiff's emotional distress claims arising from her employment with the State Department of Correction where the trial court erroneously determined that the claims were barred by sovereign immunity, but the evidence of extreme and outrageous conduct was insufficient for intentional infliction of emotional distress and the evidence of foreseeability was insufficient for negligent infliction of emotional distress. Summary judgment should be affirmed on appeal if it can be sustained on any grounds. **Wells v. N.C. Dep't of Corr., 307.**

EMPLOYER AND EMPLOYEE

Civil assault—sexual harassment—ratification—The trial court erred in a sexual harassment action by granting summary judgment for the employer on a claim for civil assault where the evidence was sufficient to create a genuine issue of material fact regarding ratification. **Guthrie v. Conroy**, 15.

Covenant not to compete—not unreasonable—A covenant not to compete was not unreasonable in its time, territory or scope where it prohibited defendant employee from working for a direct competitor of plaintiff in North Carolina and South Carolina for a period of one year. **Precision Walls, Inc. v. Servie**, 630.

Failure to pay stock bonus—forfeiture based on leaving company—The trial court erred by granting summary judgment in favor of plaintiff for an alleged violation of N.C.G.S. § 95-25.6 for failure to pay plaintiff his stock bonus that defendant claimed plaintiff forfeited by leaving the company. **Murphy v. First Union Capital Mkts. Corp.**, 205.

Failure to pay stock bonus—forfeiture based on leaving company—written notice—The trial court erred by granting summary judgment in favor of plaintiff and by denying defendants' summary judgment motion on the issue of whether N.C.G.S. § 95-25.8 was violated when defendants forfeited part of plaintiff's bonus in the form of stock when he left to work elsewhere. **Murphy v. First Union Capital Mkts. Corp.**, 205.

Negligent retention and supervision—underlying tort—The trial court did not err by granting summary judgment for defendant employer on a claim for negligent retention and supervision of an employee accused of sexually harassing plaintiff where there was no viable tort claim against the employee. **Guthrie v. Conroy**, 15.

Non-competition agreement—injunction to enforce—time of execution—The trial court did not err by granting a preliminary injunction for plaintiff-employer in an action arising from a non-competition agreement where defendant contended that the agreement was not supported by valuable consideration because he signed it after he began work with no additional consideration, but there was evidence that the agreement was entered prior to, and as a condition of, defendant's employment with plaintiff. **Precision Walls, Inc. v. Servie**, 630.

Workplace harassment—analytic model—pretext rather than mixed-motive—The trial court properly addressed plaintiff's Whistleblower action under a pretext model rather than a mixed-motive model where plaintiff did not present any clear signs that the alleged adverse employment action was directly related to her sexual harassment complaint. The trigger for use of the mixed motive model is evidence of conduct or statements that reflect directly the alleged illegitimate criterion and that bear directly on the contested employment decision. A mixed motive does not exist simply because a wrongful motive might be inferred from a prima facie case. **Wells v. N.C. Dep't of Corr.**, 307.

Workplace harassment—pretext—insufficient evidence—The trial court correctly granted summary judgment for defendants on plaintiff's Whistleblower action where plaintiff did not produce sufficient evidence that a change in plaintiff's work conditions and a "Below Good" performance evaluation were merely pretextual. Defendants presented legitimate, non-retaliatory reasons for the changes in plaintiff's working conditions and her performance evaluation; to

EMPLOYER AND EMPLOYEE—Continued

raise a factual issue regarding pretext, plaintiff's evidence must go beyond a prima facie showing by pointing to specific, non-speculative facts which discredited defendant's non-retaliatory motive. **Wells v. N.C. Dep't of Corr.**, 307.

EVIDENCE

Corroboration—officer's testimony—statement from female minor victim's mother—The trial court did not commit plain error in a first-degree sexual offense and first-degree kidnapping of a female minor case by admitting an officer's testimony concerning a statement he took from the female minor victim's mother that twenty years earlier defendant would give her candy and dollars in return for sexual acts and that defendant continued to proposition her where variations in the mother's testimony do not directly contradict her statement, and the information in the statement tended to strengthen and confirm her trial testimony. **State v. Love**, 608.

Credibility—failure to allow testimony—no prejudicial error—Although the trial court erred in a second-degree murder case by preventing defendant from offering opinion testimony from two witnesses as to defendant's reputation for truthfulness to bolster defendant's credibility, the error does not warrant a new trial. **State v. Marecek**, 479.

Defendant owned club or nightstick—relevancy—The trial court did not abuse its discretion in a second-degree murder case by overruling defendant's objections to evidence that he owned a club or nightstick because the evidence supported the State's theory that defendant injured his wife with a blunt object and then caused her to drown. **State v. Marecek**, 479.

Hearsay—psychological test—unexplained conclusions—The trial court erred in a negligence case by admitting the unexplained conclusions of a psychological test. **Barringer v. Mid Pines Dev. Grp., L.L.C.**, 549.

Hearsay—state of mind exception—Testimony of two witnesses concerning statements made by a murder victim about her suspicions that her husband was having an affair was admissible under the state of mind exception to the hearsay rule. **State v. Marecek**, 479.

Hearsay—statements by murder victim—present sense impression—The trial court did not err in a prosecution for first-degree murder, armed robbery, and first-degree burglary by admitting the testimony of a pawn shop employee about statements made by the victim during a confrontation with defendant in the pawn shop. The statements were made as the victim witnessed the events and were therefore admissible as a present sense impression. **State v. Smith**, 29.

Hearsay—veterinary reports—bestiality—authentication—The trial court did not err by excluding the veterinary reports proffered by defendant wife at trial to support defendant's claims of alleged bestiality against her husband based on hearsay and improper authentication. **Kroh v. Kroh**, 347.

Indecent liberties—possession of pornography—nonprejudicial error—The trial court in a prosecution for indecent liberties and first-degree sexual offense erred in the admission of defendant's possession of pornographic magazines and videos where there was no evidence that defendant had viewed the materials with the victim, nothing more than speculation that defendant asked

EVIDENCE—Continued

the victim to view the materials, the testimony which the materials were supposed to corroborate was never presented to the jury, and defendant did not waive his objection by testifying about the material on cross-examination because he had timely objected when the State began the line of questioning. However, this error was not prejudicial because there was no reasonable possibility of a different result without the evidence. **State v. Smith, 514.**

Indecent liberties—sexual offenses—child victim—prior sexual misconduct with babysitter—Evidence that defendant had previously engaged in sexual misconduct with a 15-year-old babysitter was admissible under Rule 404(b) in a prosecution for taking indecent liberties and sexual offense with his 12-year-old stepdaughter to show the absence of mistake and defendant's plan, scheme or design. **State v. Smith, 514.**

Indecent liberties—victim watching movie about false accusation—excluded—There was no error in a prosecution for indecent liberties and first-degree sexual offense in the exclusion of evidence that the victim had watched a movie in which a girl with an unrequited crush on an older man made a false accusation of rape. There was no testimony tending to show that the details of the movie's plot were similar to the facts of this case, and there was no evidence that the victim had discussed the movie with others or had indicated that the movie led her to consider making an accusation against defendant. **State v. Smith, 514.**

Lay opinion—defendant's body language—schizophrenic—The trial court did not err in a kidnapping and rape prosecution by excluding a statement from one of the victims that defendant's body language was abnormal, reminded her of a schizophrenic personality, and made her uneasy. Defense counsel later elicited the identical statement during direct examination of another witness. **State v. Pratt, 694.**

Lay opinion—intoxication of assailant—The trial court did not err in a negligence action that originated in a beating outside a restaurant by admitting lay opinion testimony that the off-duty bouncer who punched and kicked plaintiff was intoxicated. The testimony was based on first-hand knowledge from personal observation and was relevant and helpful to the jury. **Miller v. B.H.B. Enters., Inc., 532.**

Motion to suppress—findings and conclusions delayed—There was no prejudicial error in a murder prosecution where the court entered its findings and conclusions on a motion to suppress long after the suppression hearing. Defendant's contention that the delay affected his decision to testify was unsupported by the record. **State v. Lippard, 564.**

Murder victim's statements—observation of victim's mental state—not present sense impression—The trial court did not err in a prosecution for first-degree murder, armed robbery, and first-degree burglary by admitting the testimony of the victim's daughter and niece regarding statements the victim made after a pawn shop confrontation over stolen goods where the statements were not sufficiently immediate to be a present sense impression, but were admissible as nonhearsay testimony relating the witnesses' observation of the mental state of the victim. **State v. Smith, 29.**

EVIDENCE—Continued

Other crimes or acts—integral part of offense—The trial court did not err in a prosecution for first-degree murder, armed robbery, and first-degree burglary by allowing defendant's wife to testify about his actions the day before, the day of, and the day after the murder, burglary, and robbery. The events of that weekend form an integral and natural part of the account of the crime. **State v. Smith, 29.**

Pathologist's testimony—number of gunshot wounds—speculative—The trial court did not err in a murder prosecution by allowing into evidence a pathologist's testimony that the victims had been shot more than once where defendant maintained that the testimony was speculative. The pathologist was more qualified than the jury to formulate an opinion about the number of gunshot wounds suffered by the victims. **State v. Lippard, 564.**

Pretrial statement—slight variations—admissible as corroboration—The trial court did not err in a first-degree murder prosecution by admitting a statement given by a State's witness which defendant contended did not corroborate the witness's testimony. Slight variations represented minor inconsistencies at most and the statement was admissible as corroborative evidence. **State v. Alexander, 701.**

Prior crimes or bad acts—sexual abuse of young female family members—common plan or scheme—The trial court did not err in a first-degree statutory sexual offense and taking indecent liberties case involving defendant's stepdaughter by allowing under N.C.G.S. § 8C-1, Rule 404(b) the testimony of defendant's natural daughter concerning his sexual abuse of her to show a common plan or scheme by defendant of abusing young female family members. **State v. Starnes, 150.**

Sexual abuse on female minor victim's mother nearly twenty years before—proof of identity, common scheme, plan, modus operandi, and intent—remoteness—The trial court did not err in a first-degree sexual offense and first-degree kidnapping of a female minor case by admitting evidence of alleged sexual abuse by defendant on the female minor victim's mother nearly twenty years before the present charge, when the mother was nine years old. **State v. Love, 608.**

Videotape of murder victim—admissible—The trial court did not err in a prosecution for first-degree murder, armed robbery, and first-degree burglary by admitting a videotape of the corpse and the area where it was found. After a voir dire, the court limited the playing of the tape before the jury, and a witness testified at trial that the videotape was an accurate description of the body as he found it and answered eight questions about the crime scene. The tape was not admitted solely to arouse the passions of the jury. **State v. Smith, 29.**

FIDUCIARY RELATIONSHIP

Breach of fiduciary duty—motion to dismiss—sufficiency of evidence—The trial court erred by granting defendants' motions under N.C.G.S. § 1A-1, Rules 12(b)(6) and 12(c) regarding plaintiff club's claim for breach of fiduciary duty and constructive fraud against the defendant individual, and its claim for unfair and deceptive trade practices against all defendants arising out of the defective construction of the pertinent facilities that were allegedly not discov-

FIDUCIARY RELATIONSHIP—Continued

erable prior to the closing even though the parties signed an agreement containing provisions that would limit defendants' liability after title was conveyed to the club. **Governor's Club, Inc. v. Governor's Club Ltd. P'ship, 240.**

FIREARMS AND OTHER WEAPONS

Discharging firearm into occupied property—sufficiency of evidence—In a prosecution for discharging a firearm into occupied property, there was sufficient evidence that defendant shot the victim while standing outside the car in which the victim was sitting and the court did not err by denying a motion to dismiss. **State v. Alexander, 701.**

FRAUD

Constructive—motion to dismiss—sufficiency of evidence—The trial court erred by granting defendants' motions under N.C.G.S. § 1A-1, Rules 12(b)(6) and 12(c) regarding plaintiff club's claim for breach of fiduciary duty and constructive fraud against defendant individuals, and its claim for unfair and deceptive trade practices against all defendants arising out of the defective construction of the pertinent facilities that were allegedly not discoverable prior to the closing even though the parties signed an agreement containing provisions that would limit defendants' liability after title was conveyed to the club. **Governor's Club, Inc. v. Governor's Club Ltd. P'ship, 240.**

Credit cards—findings of fact—intentionally deceptive conduct—The trial court's findings of fact supported its conclusion that plaintiff was entitled to damages for fraud based on defendant's actions of acquiring credit cards in plaintiff's name without plaintiff's knowledge, falsely assuring plaintiff that defendant was also liable on the cards, and incurring significant charges in plaintiff's name on the credit cards. **Meekins v. Box, 379.**

HOMICIDE

First-degree murder—instruction on second-degree denied—no error—The trial court in a first-degree murder prosecution did not err by denying defendant's request to instruct the jury on second-degree murder as a lesser included offense where defendant asserted mental illness, but the State's evidence established every element of first-degree murder, including premeditation and deliberation, and there was no evidence to negate these elements. **State v. Hornsby, 358.**

First-degree murder—short-form indictment—constitutional—The short-form murder indictment is constitutional. **State v. Smith, 29; State v. Hornsby, 358.**

IMMUNITY

Public official—position not created by statute or constitution—An instructor of volunteer fireman was not a public official entitled to personal immunity where his position was not statutorily or constitutionally created. **Seymour v. Lenoir Cty., 464.**

Sovereign—conversion—contract claims—The trial court erred by denying a motion to dismiss an action for conversion of pianos against a state university on

IMMUNITY—Continued

the ground of sovereign immunity, but not by denying a motion to dismiss a property damage claim which arose from contract provisions. **Kawai Am. Corp. v. University of N.C. at Chapel Hill**, 163.

Sovereign—insurance purchased—intentional acts excluded—no waiver—Defendant volunteer fire department did not waive its sovereign immunity through the purchase of insurance where plaintiff-fireman was injured when he was ordered into a burning building during a training exercise and brought a *Woodson* claim which alleged intentional acts substantially certain to cause injury or death which were not covered by defendant's insurance. **Seymour v. Lenoir Cty.**, 464.

Sovereign—workplace harassment—emotional distress—The trial court correctly granted summary judgment for defendants Florence and Daughtry on plaintiff's emotional distress claims arising from her employment with the State Department of Correction where the trial court erroneously determined that the claims were barred by sovereign immunity, but the evidence was not sufficient for negligent or intentional infliction of emotional distress. **Wells v. N.C. Dep't of Corr.**, 307.

INDEMNITY

Construction contract—motion for judgment on the pleadings—The trial court did not err in a breach of contract action by granting third-party defendant's N.C.G.S. § 1A-1, Rule 12(c) motion for judgment on the pleadings regarding an indemnity provision in a construction contract because the agreements purport to indemnify third-party plaintiff for its own negligence and violate N.C.G.S. § 22B-1. **Jackson v. Associated Scaffolders & Equip. Co.**, 687.

INDICTMENT AND INFORMATION

Short-form—first-degree sexual offense—The trial court did not err by finding an indictment for first-degree sexual offense to be constitutionally valid. **State v. Love**, 608.

INJUNCTION

Preliminary—likelihood of success on merits—irreparable loss—The trial court erred by denying plaintiff corporation's motion for a preliminary injunction enjoining defendant from further breaching a confidentiality, no-solicitation, and noncompetition agreement. **QSP, Inc. v. Hair**, 174.

Security—temporary restraining order continued as preliminary injunction—Defendant could not argue on appeal that the trial court erred by not considering whether a bond or security was necessary to protect him when a temporary restraining order was continued as a preliminary injunction. The record was silent as to whether defendant made any argument before the trial court about whether the security given for the temporary restraining order was insufficient. **Precision Walls, Inc. v. Servie**, 630.

INSURANCE

Automobile—simultaneous use of two vehicles—amount of coverage—The Financial Responsibility Act requires all motor vehicle liability policies to

INSURANCE—Continued

provide minimum liability coverages for each insured vehicle being “used” by the insured at the time of an accident, and the Act does not limit an insured’s “use” of insured vehicles to one at a time. N.C.G.S. § 20-279.21(b)(2). **Floyd v. Integon Gen. Ins. Co.**, 445.

Automobile—towing truck from ditch—use of both vehicles—double coverage—The amount of liability coverage provided by the insured’s policy for an accident that occurred when an oncoming vehicle struck insured’s car while the car blocked a lane of traffic as the insured attempted to pull his disabled truck from a ditch was the total of the per person and per accident coverages for each of insured’s two vehicles because (1) the insured was “using” the disabled truck as well as the car at the time of the accident even though the truck was not struck and was not then being driven or otherwise operated; and (2) there was a causal connection between insured’s use of the disabled truck and the accident since insured’s car would not have been parked across a lane of traffic and would not have been struck had the insured not been attempting to attach and tow the disabled truck. **Floyd v. Integon Gen. Ins. Co.**, 445.

Conflicting provisions—ambiguous—construed against insurer—The trial court did not err in a declaratory judgment action arising from an automobile accident by granting summary judgment for defendants seeking a declaration of rights under an insurance policy. The accident involved American Legion baseball players driving to a game and the policy had an exclusion for the use of an automobile and an endorsement for activities incidental to games. The policy was ambiguous and was construed against the insurer. **Scottsdale Ins. Co. v. Travelers Indem. Co.**, 231.

UIM—multiple claimants—calculation of combined single limit—In a declaratory judgment action brought by an insurance company to determine underinsured motorist coverage for injuries arising from an automobile accident, both policy and statute require calculation of the difference between the “combined single limit” under the policy (\$500,000) and the total actually paid by the liability carrier (\$200,000), with the result (\$300,000) paid to the defendants on a pro rata basis. **Nationwide Mut. Ins. Co. v. Haight**, 137.

INTEREST

Offer of judgment—prejudgment interest—judgment finally obtained—The trial court improperly omitted prejudgment interest on compensatory damages from the time an automobile accident suit was filed until entry of judgment in calculating the judgment finally obtained to determine whether such judgment was larger than defendant’s Rule 68 lump sum offer of judgment which was refused by plaintiff and thus whether the offer of judgment tolled the accrual of prejudgment interest as of the date of the offer. **Phillips v. Warren**, 679.

JUDGMENTS

Default—failure to obtain attorney not excusable neglect—The trial court did not abuse its discretion by denying defendant’s motion to set aside default judgment based on alleged excusable neglect when defendant was aware of the lawsuit because failure to obtain an attorney and ignorance of the judicial process do not constitute excusable neglect. **Creasman v. Creasman**, 119.

JUDGMENTS—Continued

Default—insurance company's Rule 60 motion to set aside—any reason justifying relief from operation of judgment—The trial court did not err in an action arising out of a motor vehicle accident by denying unnamed defendant insurance company's N.C.G.S. § 1A-1, Rule 60(b)(6) motion to set aside a default judgment entered against defendant individual which would allow relief for any other reason justifying relief from the operation of the judgment. **Barton v. Sutton, 706.**

Default—insurance company's Rule 60 motion to set aside—notification requirements—The trial court did not err in an action arising out of a motor vehicle accident by denying unnamed defendant insurance company's N.C.G.S. § 1A-1, Rule 60(b)(4) motion to set aside a default judgment entered against defendant individual even though defendant insurance company contends the judgment is void based on plaintiff's failure to provide it with notice of the lawsuit as required by N.C.G.S. § 20-279.21. **Barton v. Sutton, 706.**

Default—service by publication—actual notice—The trial court did not abuse its discretion by denying defendant's motion to set aside default judgment based on an alleged lack of jurisdiction due to service by publication where defendant had actual notice of the pending action, and defendant could not attack the default judgment on the basis that the statutory requirement of due diligence had not been met. **Creasman v. Creasman, 119.**

Rule 68—post-offer costs—inclusion in judgment—The trial court erred in the calculation of costs in the determination of whether Rule 68 applied by not including post-offer costs in the judgment finally obtained. **Phillips v. Warren, 679.**

JURISDICTION

Child support—nonresident father—long-arm statute—The trial court had statutory authority under N.C.G.S. § 52C-2-201(3) and (5) to exercise personal jurisdiction over defendant nonresident father in an action for child support on grounds that "defendant resided with the child in this State" and that the minor child "resides in this State as a result of the acts or directives of" the father where the trial court found on the basis of competent evidence that the father purchased a house in North Carolina partially to allow his daughter to attend school in this State, and that, while still married to plaintiff mother, defendant visited plaintiff and his daughter in this State at least once per month for at least two years and resided in the marital residence for three or more days at a time. **Butler v. Butler, 74.**

Personal—domestic action—spouse and children in North Carolina—minimum contacts—Defendant's right to due process was not violated by the state's exercise of personal jurisdiction over him in a domestic action where the parties lived in the Bahamas for the first years of their marriage; plaintiff and her two daughters moved to a house in North Carolina purchased by plaintiff and defendant; defendant testified that he was convinced that North Carolina was the best place to educate the girls; defendant visited at least once a month for two years during the marriage, staying in the house for three or more days at a time; defendant maintained a membership in a social and sporting association in Moore County; and defendant used the equity in the house for business purposes. **Butler v. Butler, 74.**

JUVENILES

Disorderly conduct—motion to dismiss—sufficiency of evidence—The trial court did not err by denying respondent juvenile's motion to dismiss two charges of disorderly conduct based on his use of foul language in the classroom on 6 February 2001 and his behavior in the classroom and first aid room on 7 February 2001. **In re Pineault, 196.**

Injury to real property—motion to dismiss—sufficiency of evidence—The trial court did not err by denying respondent juvenile's motion to dismiss the charge of injury to real property based on his kicking a door at school that caused damage to a wall. **In re Pineault, 196.**

KIDNAPPING

Lack of consent—failure to release in safe place—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss or reduce a first-degree kidnapping charge based on insufficient evidence that the victims did not consent and on release in a safe place where defendant ordered the victims into the woods at gunpoint, bound their hands and wrapped their faces with duct tape, repeatedly threatened to kill them and left them bound and gagged in the woods at night. **State v. Pratt, 694.**

LARCENY

Fatal variance in indictment—property of evicted tenant stolen—no possessory interest in landlord—The trial court erred by not dismissing a felony larceny charge for a fatal variance between the indictment and the evidence where the indictment alleged that defendant had taken items belonging to the landlord of a mobile home from which defendant's father had been evicted, but the evidence was that the items belonged to defendant's father. **State v. Craycraft, 211.**

LIBEL AND SLANDER

Slander per se—bestiality—child molestation—The trial court did not err by finding defendant wife liable for slander per se for her statements to various individuals that her husband was having sex with the family dog and molesting her children. **Kroh v. Kroh, 347.**

MALICIOUS PROSECUTION

Domestic violence protective order—special damages—The trial court erred by granting defendant's motion for a j.n.o.v. on a malicious prosecution claim arising from a domestic violence protective order where the prohibitions stemming from the order were sufficient to find that plaintiff suffered substantial interference with his person and property resulting in special damages. **Alexander v. Alexander, 169.**

MOTOR VEHICLES

Reckless driving—failure to produce license—uniform citation—misdemeanor statement of charges—Defendant was properly charged and tried for misdemeanor offenses of reckless driving and failure to produce a driver's

MOTOR VEHICLES—Continued

license where the offenses were committed in the officer's presence; the officer issued defendant a uniform citation for those offenses; the officer took defendant before a magistrate who found that probable cause existed; and defendant objected to service by criminal citation and was then served with a statement of charges by an assistant district attorney pursuant to N.C.G.S. §§ 15A-303(a) and 15A-922(a). **State v. Phillips, 679.**

NEGLIGENCE

Baseball stadium—protection from foul balls—The trial court did not err by granting defendants' Rule 12 (b)(6) motion to dismiss in a negligence action which arose when plaintiff was struck in the back of the head by a foul ball which bounced off a beam. Plaintiff chose to sit in a seat exposed to the hazards of the game rather than in a seat behind protective netting; even though a front protective screen might not have prevented this injury, defendants discharged their duty to plaintiff by providing a screened section. **Hobby v. City of Durham, 234.**

Beating outside restaurant—failure of manager and bouncers to intervene—The trial court properly denied defendant restaurant owner's motion for a directed verdict on the issue of negligence in an action arising from a beating outside the restaurant where defendant's manager and two bouncers escorted plaintiff from the building and watched while an intoxicated off-duty bouncer punched and kicked plaintiff. **Miller v. B.H.B. Enters., Inc., 532.**

Contributory—common law rescue doctrine—Good Samaritan statute—reckless, wanton conduct, or intentional wrongdoing—A defendant who rear-ended plaintiff's car was not required to show that plaintiff's actions of stopping her car on the road during a rescue attempt of a third person amounted to reckless, wanton conduct, or intentional wrongdoing before the court could find plaintiff contributorily negligent. **Hutton v. Logan, 94.**

Contributory—directed verdict—parking on the traveled portion of a highway—The trial court did not err in an action arising out of an automobile accident by directing verdict in favor of defendant on the issue of contributory negligence as a matter of law on the basis of the statutory violation of N.C.G.S. § 20-161 which prohibits parking on the traveled portion of a highway. **Hutton v. Logan, 94.**

Instructions—bar fight—responsibility of restaurant owners—The trial court did not err in its instructions in a negligence action arising from a beating by an off-duty bouncer. **Miller v. B.H.B. Enters., Inc., 532.**

Instructions—diversion—The trial court erred in a negligence case, where plaintiff husband was injured after tripping on an electrical cord at a buffet table, by refusing to give plaintiffs' requested jury instructions on diverted attention. **Barringer v. Mid Pines Dev. Grp., L.L.C., 549.**

Intervening cause—attack outside restaurant—Defendant restaurant owner was not relieved of negligence by an intervening cause where defendant's manager and two bouncers escorted plaintiff from the restaurant and an off-duty bouncer punched and kicked plaintiff. **Miller v. B.H.B. Enters., Inc., 532.**

PLEADINGS

Amendments—negligence—last clear chance—The trial court did not abuse its discretion by allowing plaintiff to amend his pleadings to conform to evidence of last clear chance in an action arising from a beating outside a restaurant where there was sufficient evidence to support the doctrine and defendant restaurant owner did not argue that it was prejudiced by the amendment. **Miller v. B.H.B. Enters., Inc.**, 532.

Rule 11 sanctions—complaint filed for improper purpose—The trial court did not err in a trade secrets and breach of contract case by imposing sanctions against plaintiff corporation under N.C.G.S. § 1A-1, Rule 11 based on the trial court's conclusion that the complaint was filed for an improper purpose. **Static Control Components, Inc. v. Vogler**, 599.

Rule 11 sanctions—complaint not well-grounded in fact or based upon reasonable inquiry—The trial court did not err in a trade secrets and breach of contract case by imposing sanctions against plaintiff corporation under N.C.G.S. § 1A-1, Rule 11 based on the verified complaint not being well-grounded in fact or based upon a reasonable inquiry. **Static Control Components, Inc. v. Vogler**, 599.

Rule 11 sanctions—survival of summary judgment motion not a bar—The trial court did not err in a trade secrets and breach of contract case by imposing sanctions against plaintiff corporation under N.C.G.S. § 1A-1, Rule 11 even though plaintiff had obtained a preliminary injunction and had survived defendant's summary judgment motion. **Static Control Components, Inc. v. Vogler**, 599.

Rule 11 sanctions—timeliness of motion—The trial court did not err in a trade secrets and breach of contract case by concluding that defendant moved for N.C.G.S. § 1A-1, Rule 11 sanctions in a timely fashion. **Static Control Components, Inc. v. Vogler**, 599.

PROBATION AND PAROLE

Ex parte probation modification—written notice requirement—The trial court erred in an indecent liberties with a minor case by finding an ex parte probation modification entered on 26 June 2000 was valid even though defendant's probation officer gave defendant oral notice of the modification. **State v. Seek**, 237.

PROCESS AND SERVICE

Service by publication—default judgment—actual notice—The trial court did not abuse its discretion by denying defendant's motion to set aside default judgment based on an alleged lack of jurisdiction due to service by publication where defendant had actual notice of the pending action and defendant could not attack the default judgment on the basis that the statutory requirement of due diligence had not been met. **Creasman v. Creasman**, 119.

Service by publication—due diligence—The trial court did not err by concluding that service of process upon respondent father was proper under N.C.G.S. § 1A-1, Rule 4(j1) based on service by publication after defendant could not be found by a diligent effort. **In re Shaw**, 126.

PUBLIC OFFICERS AND EMPLOYEES

Dismissal without notice—unacceptable personal conduct—contracts not preaudited—A county health director's failure to obtain preaudits of contracts in violation of N.C.G.S. § 159-28 did not constitute unacceptable personal conduct sufficient to warrant dismissal without prior warning. **Steeves v. Scotland Cty. Bd. of Health, 400.**

Termination of state employee—contempt of court—personal misconduct—Respondent state employee's dismissal for personal misconduct was appropriate based on a magistrate's judgment finding her in contempt of court. **N.C. Dep't of Corr. v. Brunson, 430.**

Workplace harassment—Whistleblower action—The trial court did not err by determining that plaintiff's Whistleblower action was properly before the court rather than the State Personnel Commission where the action arose from workplace harassment. N.C.G.S. § 126-36(b) provides plaintiff with the right to appeal directly to the State Personnel Commission but does not bar a Whistleblower action. **Wells v. N.C. Dep't of Corr., 307.**

RELEASE

Mutual mistake—not shown—The trial court did not err by granting summary judgment for defendants in an action seeking reformation of a release following an automobile accident where plaintiff did not assert the existence of any fact or term in the release that was incorrect, omitted in error, or misunderstood, and did not allege that either party misunderstood the general meaning or effect of the release. **Sudds v. Gillian, 659.**

Mutual mistake—silence during negotiations—no misrepresentation—The plaintiff in an action seeking reformation of a release was not entitled to summary judgment against a defendant who did not negotiate with him or respond to his inquiries. Plaintiff alleged only that this defendant did not respond to his letters, but did not allege any fact misrepresented by defendant's silence on which plaintiff relied to his detriment. **Sudds v. Gillian, 659.**

SEARCH AND SEIZURE

Warrant—improper address—failure to use full name—motion to suppress—The trial court did not err in a trafficking in cocaine and knowingly maintaining a place to keep or sell a controlled substance case by denying defendant's motion to suppress the evidence seized at defendant's home pursuant to a search warrant even though the warrant did not use defendant's full name and defendant's address was listed as "996" instead of "995." **State v. Moore, 156.**

SENTENCING

Aggravating factor—took advantage of position of trust or confidence—The trial court erred in a second-degree murder case by sentencing defendant in excess of the presumptive range based on the finding of the aggravating factor under N.C.G.S. § 15A-1340.4(a)(1)(n) that defendant took advantage of a position of trust or confidence because there was no evidence that defendant exploited his wife's trust in order to kill her. **State v. Marecek, 479.**

Aggravating factor—took advantage of position or trust or confidence—false pretenses—The trial court did not err in obtaining property by false pre-

SENTENCING—Continued

tenses cases (98CRS 72458-72461) arising out of defendant's loan brokering scheme by finding as an aggravating factor under N.C.G.S. § 15A-1340.16(d)(15) that defendant took advantage of a position of trust or confidence to commit the offenses. **State v. Murphy, 335.**

Aggravating factor—took advantage of position or trust or confidence—false pretenses—embezzlement—The trial court erred in an obtaining property by false pretenses case (98CRS 30353) involving the Swim Association by finding as an aggravating factor under N.C.G.S. § 15A-1340.16(d)(15) that defendant took advantage of a position of trust or confidence to commit the offense, and the case is remanded for resentencing for embezzlement. **State v. Murphy, 335.**

Aggravating factor—took advantage of position or trust or confidence—guilty plea to false pretenses—The trial court was not precluded in obtaining property by false pretenses cases (98CRS 72458-72461) arising out of defendant's loan brokering scheme from finding the trust or confidence aggravating factor under N.C.G.S. § 15A-1340.16(d)(15) because defendant's guilty plea on false pretenses charges did not operate as an acquittal on the charge of embezzlement arising from the same transactions and did not collaterally estop the State from relitigating the issue of whether a relationship of trust or confidence existed between defendant and the victims. **State v. Murphy, 335.**

Aggravating factor—victim very young—The trial court did not err in a first-degree statutory sexual offense and taking indecent liberties case involving defendant's stepdaughter by imposing an aggravated range sentence based on the aggravating factor that the victim, defendant's stepdaughter, was very young. **State v. Starnes, 150.**

Restitution—ownership of stolen items—The trial court erred in part by ordering restitution from a defendant who broke into a trailer from which his father had been ejected and took a table and chairs. The table and chairs did not belong to the landlord and he was not the aggrieved party to be compensated for the loss; however, the amount attributable to damage to the mobile home was proper. **State v. Craycraft, 211.**

Statutory mitigating factor—lacked criminal convictions—The trial court did not err in a second-degree murder case by failing to find the statutory mitigating factor under N.C.G.S. § 15A-1340.4(a)(2)(a) that defendant lacked any criminal convictions because defendant did not present any direct evidence regarding his criminal record. **State v. Marecek, 479.**

Statutory mitigating factor—person of good character or good reputation in community—false pretenses—The trial court did not err in obtaining property by false pretenses cases by failing to find as a mitigating factor under N.C.G.S. § 15A-1340.16(e)(12) that defendant has been a person of good character or has had a good reputation in the community in which he lives. **State v. Murphy, 335.**

TAXATION

Ad valorem—educational exemption—facilities wholly used for education—The Property Tax Commission erred by determining that the Maharishi Spiritual Center did not meet the requirements for an educational exemption

TAXATION—Continued

from property taxes in that the facilities are not wholly and exclusively used for educational purposes because some members use their compounds primarily for group meditation. **In re Appeal of the Maharishi Spiritual Ctr. of Am., 269.**

Ad valorem—educational exemption—non-profit corporation—A whole record review reveals that the Property Tax Commission did not err by affirming a county board's decision finding that 100 acres owned by taxpayer non-profit corporation to train missionaries were exempt from ad valorem taxation but that the taxpayer did not meet its burden of proving that its 1,247 acres similarly owned were entitled to an educational tax exemption under N.C.G.S. § 105-278.4. **In re Appeal of the Maharishi Spiritual Ctr. of Am., 269.**

Ad valorem—educational exemption—ownership—The Property Tax Commission erred by determining that the Maharishi Spiritual Center did not meet the educational institution ownership requirement for a property tax exemption. N.C.G.S. § 105-278.4 does not require that an organization must meet formalities such as a degree, certification, or accreditation to be classified as an educational system, and the term "educational institution" easily accommodates the nature of the Spiritual Center's organization. **In re Appeal of the Maharishi Spiritual Ctr. of Am., 269.**

Ad valorem—educational exemption—school—The Property Tax Commission erred by determining that property used by a girl's school operated by a transcendental meditation organization was not entitled to an educational property tax exemption. **In re Appeal of the Maharishi Spiritual Ctr. of Am., 269.**

Ad valorem—educational exemption—type of facilities—The Property Tax Commission erred by concluding that the Maharishi Spiritual Center did not meet the requirement for an educational exemption from property taxes in that the facilities were not of a kind commonly employed in or naturally incident to the operation of an educational institution. There was evidence that universities set aside places for meditation and there was no evidence that the Spiritual Center's facilities are not the kind commonly employed by educational institutions. **In re Appeal of the Maharishi Spiritual Ctr. of Am., 269.**

TERMINATION OF PARENTAL RIGHTS

Best interest of child—consideration by court—The trial court did not err by concluding that it was in a child's best interest to terminate parental rights where the court's 199 findings demonstrate that the court thoroughly considered the child's best interests. **In re Greene, 410.**

Child abuse—Munchausen Syndrome by Proxy—fabrication of medical problems—The trial court's termination of respondent mother's parental rights for abuse of the child was supported by clear, cogent and convincing evidence that respondent suffers from Munchausen Syndrome by Proxy; that respondent's intentional actions created a substantial risk of serious physical injury to her child in that, during the two years prior to the child being removed from respondent's home, respondent subjected the child to 25 difference emergency room visits, 60 office visits to pediatricians, 143 prescriptions, and 8 admissions to the hospital; that respondent fabricated and exaggerated the child's medical problems to medical personnel; and that there was a strong probability of a repetition of abusive behavior because respondent has failed to make any substantial

TERMINATION OF PARENTAL RIGHTS—Continued

improvements to correct the conditions that led to the child being removed from her custody. **In re Greene, 410.**

Neglect—clear, cogent, and convincing evidence—Although the trial court erred by finding and concluding in a termination of parental rights case that respondent putative father neglected the three pertinent children based on the fact that he never appeared in court in the underlying juvenile file concerning his children, the trial court did not err by concluding that clear, cogent, and convincing evidence existed to show that respondent father neglected the three children after respondent learned of their existence. **In re Mills, 1.**

Sealed records—reviewed in camera—The trial court did not err by excluding from a termination of parental rights proceeding documents within DSS files where the trial court inspected the records in camera and turned over to respondent those documents it deemed relevant and material. The remaining, sealed documents were reviewed on appeal and found to shed no light on respondent's ability to care for the child and retain her parental rights. **In re Greene, 410.**

Stable home environment—best interests of child—The trial court did not err by concluding in a termination of parental rights case that it was in the children's best interests that respondent putative father's parental rights be terminated. **In re Mills, 1.**

TORT CLAIMS ACT

Jones Act—injury to seaman—sovereign immunity—The Industrial Commission did not err by dismissing plaintiff employee seaman's claim for injuries against defendant employer Department of Transportation based on lack of jurisdiction under the Tort Claims Act because the State has not waived its sovereign immunity to Jones Act claims for injury to a seaman. **Midgett v. N.C. Dep't of Transp., 666.**

Negligent acts of licensed foster parents—respondent superior—lack of jurisdiction—The Industrial Commission did not err by dismissing based on lack of jurisdiction a case concluding that the North Carolina Department of Health and Human Services (DHHS) may not be held liable under the Tort Claims Act for the alleged negligent acts of licensed foster parents under the doctrine of respondeat superior. **Creel v. N.C. Dep't of Health & Human Servs., 200.**

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Refusal to review memorandum of law—harmless—The trial court's failure to review plaintiff's written memorandum of law was harmless where the court correctly granted summary judgment for defendant. **Sudds v. Gillian, 659.**

TRUSTS

Resulting—burden of proof—Although defendant contends the trial court erred by failing to state in its judgment what burden of proof it used in its decision granting a resulting trust on defendant's interest in the pertinent property, the trial court was not required to do so. **Meekins v. Box, 379.**

Resulting—remedy not requested—notice—The trial court did not err by finding that plaintiff was entitled to a resulting trust on defendant's interest in the

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pertinent property even though plaintiff did not specifically request this remedy in her original complaint. **Meekins v. Box, 379.**

UNFAIR TRADE PRACTICES

Motion to dismiss—sufficiency of evidence—The trial court erred by granting defendants' motions under N.C.G.S. § 1A-1, Rules 12(b)(6) and 12(c) regarding plaintiff club's claim for breach of fiduciary duty and constructive fraud against defendant individuals, and its claim for unfair and deceptive trade practices against all defendants arising out of the defective construction of the pertinent facilities that were allegedly not discoverable prior to the closing even though the parties signed an agreement containing provisions that would limit defendants' liability after title was conveyed to the club. **Governor's Club, Inc. v. Governor's Club Ltd. P'ship, 240.**

UNJUST ENRICHMENT

Failure to provide evidence of value of improvements—The trial court did not err by concluding as a matter of law that defendant failed to establish her counterclaim for unjust enrichment because neither testimony by defendant nor that of her father provided evidence of the value of improvements to the pertinent property. **Meekins v. Box, 379.**

WITNESSES

Children—ordering public to leave courtroom not plain error—The trial court did not commit plain error in a first-degree statutory sexual offense and taking indecent liberties case involving defendant's stepdaughter by ordering the public to leave the courtroom during the voir dire of defendant's natural daughter. **State v. Starner, 150.**

Expert—qualifications—extensive knowledge and training—The trial court did not err in a trafficking in cocaine and knowingly maintaining a place to keep or sell a controlled substance case by qualifying a witness as an expert in the sale, manufacture, and possession of cocaine, and allowing him to testify about a hypothetical drug operation. **State v. Moore, 156.**

WORKERS' COMPENSATION

Attendant care—reimbursement rate—The Industrial Commission did not err in a workers' compensation case by establishing an attendant care reimbursement rate of \$10.00 per hour for plaintiff employee's family members. **Levens v. Guilford Cty. Schools, 390.**

Attendant care—retroactive payment rate—The trial court did not err in a workers' compensation case by ordering retroactive payment to plaintiff employee's family members for attendant-care services at a rate equivalent to that paid to a trained certified nursing assistant. **Levens v. Guilford Cty. Schools, 390.**

Causation—"could" and "might" testimony—The Industrial Commission's finding in a workers' compensation action that plaintiff's deep venous thrombosis was a result of an accident at work was supported by competent evidence and was not speculative even though it was couched in "coulds" and "mights." "Could"

WORKERS' COMPENSATION—Continued

or "might" expert testimony is insufficient to support causation only when there is additional evidence showing the opinion to be speculation. **Holley v. Acts, Inc.**, 369.

Continuing disability—failure to meet burden of proof—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee had not met her burden of proof to show a continuing disability. **Gilberto v. Wake Forest Univ.**, 112.

Date of disability—admission by party—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee's disability began 1 January 1995, the date on which plaintiff's paid medical sabbatical began, instead of 1 September 1995, the date on which plaintiff began her unpaid leave of absence. **Gilberto v. Wake Forest Univ.**, 112.

Deep venous thrombosis—compensation—An Industrial Commission opinion awarding benefits for permanent injury to an internal organ under N.C.G.S. § 97-31(24) for plaintiff's deep venous thrombosis was remanded for consideration of whether plaintiff's injury was a scheduled injury under N.C.G.S. § 97-31(15) for loss of use of her leg because an award under subsection (24) is permitted only if no compensation is payable under any other subsection of N.C.G.S. § 97-31. **Holley v. Acts, Inc.**, 369.

Disability—released to return to work—The Industrial Commission did not err in a workers' compensation case by finding that the now deceased employee remained disabled after he was released to return to work on 26 June 1998 by a doctor even though defendant attempted to perform a number of jobs on his own that were outside of his restrictions. **Skillin v. Magna Corp./Greene's Tree Serv., Inc.**, 41.

Exclusivity—injury arising from employment—restaurant manager robbed and beaten—Plaintiff's claims are barred by the exclusivity provisions of the Workers' Compensation Act where plaintiff worked as a restaurant night manager, suffered post traumatic stress syndrome after being beaten and robbed by a co-employee, and brought a civil action based on defendant's alleged failure to investigate the co-employee's background before hiring him. Contrary to plaintiff's contention, a binding Form 21 agreement acknowledged that the injury arose from plaintiff's employment. Moreover, plaintiff's action was not allowed under *Woodson v. Rowland*, 329 N.C. 330 (1991), and while plaintiff contended that being attacked by a co-employee was not an expected incident of her employment, robbery is a general risk of counting money at a business at closing time. **Caple v. Bullard Restaurants, Inc.**, 421.

Exclusivity—volunteer fire department instructor—co-employee—A volunteer fireman's claim against an instructor was not barred by the exclusivity provision of the Workers' Compensation Act where plaintiff brought a *Pleasant* claim by alleging that the instructor was willful and wanton in ordering him into a burning building during a training exercise, but the instructor contended that he was an officer in the corporation and that the stricter *Woodson* standard applied. The instructor was more plaintiff's co-employee than employer. **Seymour v. Lenoir Cty.**, 464.

Findings of fact—conclusions of law—credible evidence—Although defendants contend the Industrial Commission erred in a workers' compensation case

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by failing to base its findings of fact and conclusions of law on credible competent evidence, the full Commission is the sole judge of the weight and credibility of the evidence. **Skillin v. Magna Corp./Greene's Tree Serv., Inc.**, 41.

Findings of fact—partially unsupported—no prejudicial error—There was competent evidence in a workers' compensation action to support an Industrial Commission finding about the circumstances of the injury where a specific sentence was not supported by the evidence, but there was competent evidence in the record to support the remainder of the finding and both parties stipulated to a statement of how the injury occurred. **Holley v. Acts, Inc.**, 369.

Handicapped housing—remodeling versus construction of a new home—The Industrial Commission did not err in a workers' compensation case by failing to require defendant employer to build plaintiff employee a new house and by giving defendant the option of remodeling plaintiff's existing home to render it handicap-accessible. **Levens v. Guilford Cty. Schools**, 390.

Injury not arising from employment—employee shot at work by former boyfriend—The Industrial Commission did not err by denying plaintiff employee workers' compensation benefits based on the fact that her injury did not arise out of her employment even though she was shot at her place of employment by her former boyfriend. **Dildy v. MBW Invs., Inc.**, 65.

Jurisdiction—automobile accident in workplace parking lot—The trial court correctly dismissed plaintiffs' negligence action where plaintiff was injured in an automobile accident in a parking lot after work and his remedy falls within the exclusivity provisions of the Workers' Compensation Act. The evidence was that plaintiff's conduct after his shift ended was devoted exclusively to looking for a ride home and then waiting for that ride to materialize. The fact that other alternatives existed does not render plaintiff's conduct unreasonable by itself. **Ragland v. Harris**, 132.

Medical expenses—time limits—The Industrial Commission's conclusion that defendants should pay all of plaintiff's related medical expenses, as required by N.C.G.S. § 97-25.1, was not overly broad in that it did not set a time limit. The employer had not made its last medical compensation payment and the statute of limitations had not begun to run. Furthermore, the parameters of N.C.G.S. § 97-2(19) were inherent in the Industrial Commission's award and defendants were not required to pay more than that statute provides. **Johnson v. Southern Tire Sales & Serv.**, 323.

Objection at hearing—no ruling—There was no prejudicial error in a workers' compensation proceeding where the Industrial Commission did not rule specifically on an objection. However, it is the better practice for the Commission to always formally enter its rulings on objections. **Johnson v. Southern Tire Sales & Serv.**, 323.

Recovery of benefits from third party—no admission of liability—The trial court correctly granted summary judgment for defendants in an action to recover workers' compensation benefits paid to plaintiff Smith by his employer (plaintiff Blair) where Smith was injured by a falling steel joist erected by defendants. There was no pleading, affidavit, or other documentation of a written admission of liability filed by the employer with the Industrial Commission, as required by N.C.G.S. § 97-10.2(c). **Blair Concrete Servs., Inc. v. Van-Allen Steel Co.**, 215.

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Refusal of suitable employment—sufficiency of evidence—The Industrial Commission did not err in a workers' compensation action by concluding that plaintiff had cooperated with vocational rehabilitation where defendants contended that plaintiff refused suitable employment but produced no evidence of any actual refusal. The only evidence defendants offered to support plaintiff's ability to obtain employment was the opinion of a vocational rehabilitation specialist, but the Industrial Commission specifically found that it gave more weight to a doctor's opinion about plaintiff's limitations. **Johnson v. Southern Tire Sales & Serv.**, 323.

Retroactive attendant care—defense of claim without reasonable grounds—attorney fees and costs—The trial court did not err in a workers' compensation case by concluding that defendant employer had defended plaintiff employee's claim for retroactive attendant care without reasonable grounds and that plaintiff was therefore entitled to reasonable attorney fees and costs. **Levens v. Guilford Cty. Schools**, 390.

Subject matter jurisdiction—insolvent insurers—The trial court correctly dismissed a declaratory judgment action for lack of subject matter jurisdiction where plaintiff sought a declaration of its responsibilities pursuant to legislation concerning workers' compensation claims against insolvent insurers. The relief sought by plaintiff would directly impact the Industrial Commission's duty to determine pending cases and the Commission is empowered by statute and precedent to adjudicate the issue presented by plaintiff. **N.C. Ins. Guar. Ass'n v. International Paper Co.**, 224.

Temporary total disability—evidence of continued disability—The Industrial Commission did not err in a workers' compensation case by awarding plaintiff temporary total disability after maximum medical improvement where there was competent evidence to support a finding that plaintiff remained disabled. **Johnson v. Southern Tire Sales & Serv.**, 323.

Work-related injury—degenerative disk disease—The Industrial Commission did not err in a workers' compensation case by concluding that the now deceased employee's degenerative disk disease in his back was a work-related injury that occurred on-the-job when decedent stepped back from a tree he was cutting and into a hole. **Skillin v. Magna Corp./Greene's Tree Serv., Inc.**, 41.

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Billboard—agricultural district not residentially zoned property—A county development ordinance prohibiting the placement of a billboard within 300 feet of any "residentially zoned property" was not violated by a billboard located within 300 feet of land zoned "Agricultural" because property zoned "Agricultural" is not "residentially zoned property" within the meaning of the ordinance even though residences are permitted in an "Agricultural" district. **Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust.**, 474.

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